***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

433

No. 17,490

GRACE FISHER BROWN,

Appellant.

v.

JOHN F. KEAVENY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



EARL H. DAVIS, Esq.

Davis & Mendelsohn
504 Federal Bar Building
1815 H Street, N. W.
Washington 6, D. C.

*Attorney for Appellant.*

## QUESTIONS PRESENTED

I.

Whether there was sufficient evidence to go to a jury in a dental malpractice case, upon the theory of res ipsa loquitur, involving a female patient, who, while under a general anesthesia (sodium pentothal) for the removal of an impacted right lower molar, sustained a compound fracture of the right jaw during said procedure?

II.

Whether a trial judge, after directing a verdict for a defendant-dentist on the negligence count of a complaint, at the end of the plaintiff's case, permits the case to be completed on a warranty count in the same complaint, does not in fact commit prejudicial error during his instructions to the jury on the warranty count, by commenting and explaining his reasons for having directed a verdict for the defendant on the negligence count?

III.

Whether defense counsel, in final summation, does not in fact make a prejudicial argument to the rights of a plaintiff on the claim for breach of warranty, when he is permitted, over objection, to in effect make an argument based partly on the negligence aspects of the total claim, as to which negligence count there has already been a directed verdict at close of plaintiff's case?

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## BRIEF FOR APPELLANT

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### JURISDICTIONAL STATEMENT

This is an appeal by Grace Fisher Brown, unsuccessful plaintiff in the trial court, in a dental malpractice case, the complaint having been in two Counts, one in negligence, the other in warranty.

The trial court had jurisdiction of the cause under and by virtue of Title 11-306, D. C. Code of Laws, 1961 Edition, as amended.

Jurisdiction of this Court is founded on Title 28, U. S. Code, Section 1291.

## STATEMENT OF THE CASE

The parties will be referred to, for convenience, as they were in the trial court. The plaintiff, Grace Fisher Brown, on July 1, 1958, was a white, married, female, then 33 years of age, employed at the Information Center of the Washington Terminal Company (J.A. 11), by which company she had been employed for several years. She was the mother of one son. For the preceding ten (10) years she had been a general patient of a general dentist, one Dr. J. Edward Hurley, who had taken general care of her dental needs, such as minor fillings, minor extractions, cleaning, etc. During the course of his care, he would give her an annual dental check-up (J.A. 12), and would annually take x-rays of an impacted right lower molar, which was asymptomatic (not giving her any pain), and he advised her that due to its peculiar impaction to leave it alone until it started to give her any trouble. It never did. (J.A. 12)

In 1956, by reason of a fall at her home, plaintiff sustained a traumatic fracture of the left mandible (jaw), for which she was treated by a Dr. Arthur Dick, and from which fracture she made an uneventful recovery, vividly recalling, however, the torturous pain, disability and inconvenience she suffered from such episode by reason of having her jaws wired for a number of weeks, and being unable to eat any solid foods for many months, being obliged to take all her nourishment by liquid form for a long time after such fall.

In April, 1958, at her annual dental check-up in the office of Dr. Hurley, he informed her that he thought he detected some change in the pathology of the aforesaid impacted right lower molar, which, even though not giving her any trouble, he suggested having removed surgically. Dr. Hurley, not feeling competent to attempt such removal himself, referred plaintiff to the defendant, Dr. John F. Keaveny, who held himself out as a specialist in oral surgery.

An appointment was made for the said purpose at Dr. Keaveny's office, for 10:00 A.M., July 1, 1958. Although plaintiff presented herself at the defendant's office punctually for said appointment, he did not get around to seeing her until well after 11:00 A.M. that day (J.A. 12, 13), whereupon, after being admitted to one of his dental surgery rooms, he had an x-ray picture taken of the tooth in question, after which he and plaintiff discussed the removal thereof. Plaintiff, vividly recalling her fracture of the left jaw less than two years prior thereto, then asked him pointedly whether or not her right jaw would be fractured in the course of such removal, and her testimony was that the defendant assured her that he would not fracture her jaw during such surgery (J.A. 14, 15). The defendant testified that he did not give any such assurance. The defendant further testified that he informed plaintiff of the risk of a fracture in the attempted removal of such an impacted tooth. Plaintiff also testified that if she had been given any such warning, she would have gotten up out of the defendant's dental chair and would have left the office (J.A. 16), and have learned to live with a toothache, if necessary, for the rest of her life. The tooth at that time was not giving her any trouble.

Plaintiff, having been given the assurance aforesaid, then agreed to have the tooth extracted.

The defendant then administered to her a general anesthetic, sodium pentothal, which rendered her totally unconscious and oblivious to what thereafter was done to her (J.A. 16). The defendant was called as an adverse witness, and interrogated as to what his procedure was in the course of this surgery, during which he described using a mallet and chisel (J.A. 43, 44, 45, 46, 48), and at other times, a drill on the affected teeth. The entire procedure took from an hour, to an hour and a half, as variously estimated by the defendant and his nurses. (J.A. 48, 103) During the procedure, the plaintiff had to be re-anesthetized. When it was concluded, the defendant testified that he turned

to his nurse, Mrs. McMullin, and said — "Gee, we got that out there without breaking that jaw." (J.A. 49)

The defendant himself did not then know that the plaintiff's right jaw had been fractured (J.A. 49), this fact being called to his attention later by one of his nurses (J.A. 110). He further testified that he did not know what broke the patient's jaw, but stated, "I am of the opinion that there must have been a muscle contraction and that muscle contraction broke the jaw. Just the same as a baseball player will break his arm, throwing the ball." (J.A. 49)

He had earlier testified that he had not explained to the patient as he was then explaining to counsel, "because she didn't ask me these questions and I didn't think actually, from a technical standpoint, that if I did explain them to her that she would not thoroughly understand." (J.A. 42)

After taking a post-operative x-ray to confirm the presence of a fracture, the plaintiff was removed to a cot in another room in the doctor's suite, where she remained until after 4:00 P.M. that day, without medical assistance of any kind. The plaintiff's husband was finally contacted, and on his arrival at the defendant's office, the plaintiff was again carried to the defendant's x-ray room, where she was again x-rayed. (The defendant had forgotten about this second post-operative x-ray, until same was mentioned during the examination of another nurse, one Monica M. McCormack (J.A. 11), who was also the defendant's receptionist; and after she admitted to such second post-operative x-ray, the defendant then resumed the stand, and testified — "and of course I wish to abide by the opinion of Mrs. McCormack in that matter (J.A. 115).

After the husband arrived at the defendant's office, he then went downstairs, and secured the services of a Dr. Alfred R. Greenfield, a medical doctor, who examined the plaintiff, advised her removal to a

hospital, and he, Dr. Greenfield, then called a Dr. Arthur Dick, who had attended plaintiff for the 1956 fracture of the left jaw, and plaintiff was then taken out of the defendant's office, and taken immediately to the Washington Hospital Center, where she was admitted as a patient, under the care of Dr. Arthur Dick. She thereafter underwent several surgical procedures for the repair of this fractured right jaw (mandible), which was described as a compound fracture, and even had additional surgery planned at the time of trial in 1962. Her injuries were considered of a permanent nature, as osteomyelitis had set in. She incurred considerable loss of earnings, lost her prior position due to inability to talk distinctly, and was ultimately obliged to take a position with a life insurance company as a bookkeeper, and clerk, at a considerable reduction in salary. Her medical expenses in attempts to be cured of the fractured right jaw were extensive.

Although the plaintiff's injury and its residuals were detailed by her attending physicians, and the hospital records, she had no "expert" as such testify to any specific negligence of the defendant during the aforesaid procedure.

Dr. J. Edward Hurley was called as a witness, by plaintiff, for the sole purpose of identifying the last x-ray pictures he had taken of the plaintiff's right lower molar on April 28, 1958, before the defendant's surgery, and to also identify a positive print of the same tooth, which negatives and positive print were received in evidence. Although he was admittedly not a specialist in any particular branch of dentistry (J.A. 82), much less a specialist in oral surgery (J.A. 86, 87), he was permitted, in cross-examination and over objection, to testify as a specialist, and was asked -- "Can you tell the court and jury from your opinion whether even with the utmost of care and skill in the extraction of that tooth, the extraction of that tooth would offer a hazard of fracture?" to which he responded -- "In the removal of any impaction which is deep seated in the bone there is always a possibility of a fracture." (J.A. 88)

The defendant, being interrogated as an adverse witness, had admitted that the plaintiff had informed him of her prior jaw fracture (J.A. 42); that prior to his surgery he did not make any kind of a test (J.A. 43); that on July 1, 1958, he found that the tooth in question was decayed (J.A. 46), although he admitted that on his pre-trial deposition he had testified that he didn't think there was much decay on that tooth at all (J.A. 47). When asked the direct question — "Would you have pulled this tooth, Doctor, if you thought there was a possibility of breaking Mrs. Brown's jaw?" he responded — "If I was certain there was going to be a fracture of the jaw, I certainly would not." (J.A. 61) He also testified that over his years of practice he had records of handling between fifty and sixty thousand patients (J.A. 39), but yet had fractured a patient's jaw prior to this case only two or three times (J.A. 40).

After Dr. Hurley had identified his x-rays, the plaintiff rested, whereupon the defendant moved for a directed verdict on the issue of negligence, and the application of the res ipsa loquitur doctrine (J.A. 90), which motion the Court granted (J.A. 95). Before proceeding with the remaining issue in the case, i.e., the warranty issue, defense counsel then asked the Court to inform the jury of his ruling on the negligence issue (J.A. 95), to which plaintiff's counsel objected, but the Court nevertheless, at that posture of the case, instead of waiting until the conclusion of all the evidence, then informed the jury of his ruling in directing a verdict on the negligence issue (J.A. 95), whereupon the defendant offered testimony of his two nurses, and further testimony of his own, then rested. After argument to the jury, and instructions by the Court, the case was submitted to the jury on the sole issue of the alleged breach of warranty, the jury thereafter returning a verdict for the defendant on said issue.

In final argument, defense counsel consumed almost two pages of the transcript discussing the issue of negligence and res ipsa

loquitur, to which plaintiff objected, which objection the Court overruled (J.A. 117, 118). In rebuttal argument, plaintiff's counsel attempted to repel the prejudicial argument of defense counsel by arguing negligence and res ipsa loquitur after said issues had been eliminated from the case by the Court's direction of a verdict on said issues, but the Court declared such rebuttal argument, sua sponte, as improper (J.A. 119).

However, in the Court's charge to the jury, the Court itself prejudicially commented on his reasons for having directed a verdict on the issue of negligence, and res ipsa loquitur, since he had already ruled said issues out of the case by his directed verdict earlier (J.A. 119, 120), and such repetition was undoubtedly prejudicial to the fair consideration of the remaining issue on warranty by the jury. Plaintiff's counsel, at the conclusion of the charge, noted an objection to the prejudicial argument of defense counsel, and asked the Court to instruct the jury to disregard same (J.A. 120). Such request was refused (J.A. 120). Plaintiff's counsel also, at the end of the Court's charge, noted an objection to the Court's refusal to permit him to rebut the defense counsel's prejudicial argument, and also objected to the Court's comment and explanation to the jury of his reasons for having directed a verdict on the negligence charge (J.A. 121).

Motion for new trial was timely filed, argued, and denied by the Court; whereupon, notice of appeal was filed.

## STATEMENT OF POINTS ON APPEAL

1. The Court erred in directing a verdict for the defendant on the negligence issue, at the end of the plaintiff's case, and in denying the application of the res ipsa loquitur doctrine to the facts of this case.

2. The Court committed prejudicial error in announcing his direction of a verdict on the negligence and res ipsa loquitur counts before the conclusion of the entire case.

3. The Court committed prejudicial error in repetitiously commenting on the negligence count in his charge to the jury, that issue having already been declared out of the case by the directed verdict — and in repeating same had a prejudicial effect on the minds of the jury in their consideration of the remaining issue on warranty.

4. The Court erred in refusing to permit plaintiff's counsel to rebut the prejudicial argument of defense counsel in final summation.

5. The Court erred in permitting Dr. J. Edward Hurley, over objection, and during cross-examination outside the scope of the direct examination, to testify as an expert witness for the defense, since he was admittedly not an expert oral surgeon.

6. The Court erred in refusing to instruct the jury to disregard the prejudicial argument of defense counsel.

7. The Court erred in denying plaintiff's requested Instructions numbered 1, 4, 7 and 9 (J.A. 121, 122, 123).

8. The Court erred in granting the defendant's requested Instruction No. 1 (J.A. 124).

9. The Court erred in denying plaintiff's Motion for New Trial (J.A. 127).

## SUMMARY OF ARGUMENT

WHERE THE INSTRUMENTALITY CAUSING AN INJURY IS WITHIN THE EXCLUSIVE CONTROL OF THE DEFENDANT, AND WHERE, AS HERE, THE PLAINTIFF WAS UNCONSCIOUS BY REASON OF BEING UNDER THE EFFECTS OF A GENERAL ANESTHESIA (SODIUM PENTOTHAL), AND THEREFORE COMPLETELY UNABLE TO TESTIFY AS TO WHAT OCCURRED, THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE IN A NEGLIGENCE ACTION AGAINST A DENTAL SURGEON WHO FRACTURES A PATIENT'S JAW IN THE COURSE OF REMOVING A TOOTH.

## ARGUMENT

### I.

In Ybarra v. Spangard, 25 Cal. 2d 486, 489, 154 P.2d 687, 689, 162 A.L.R. 1258, the Supreme Court of California said:

> "The doctrine of res ipsa loquitur has three conditions: (1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Prosser, Torts, p. 295. It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. Ayles v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Brown v. Shortlidge, 98 Cal.App. 352, 277 P. 134; Moore v. Steen, 102 Cal. App. 723, 283 P.833; Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; Vergeldt v. Hartzell, 8 Cir., 1 F.2d 633; Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228; Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425; see Shain, Res Ipsa Loquitur, 17 So.Cal.L.Rev. 187, 196.
>
> "There is however, some uncertainty as to the extent to which res ipsa loquitur may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.' 9 Wigmore, Evidence, 3d Ed., Sec. 2509, p. 382. * * *"
> (underscoring ours).

In the Ybarra case, the plaintiff was to have an appendectomy. He emerged from the anesthetic with an injured shoulder, from which he developed a paralysis and atrophy of the muscles surrounding it.

To say that the doctrine is applicable and an instruction thereon should have been given, is not to say that every time the doctrine is invoked, the person relying thereon is entitled to recover damages. All that the law requires is, that the defendant charged with negligence rebut the inference of negligence by giving a reasonable explanation of the cause of the injury. This is as it should be in a situation where the instrumentality causing the injury is within the exclusive control of the defendant, or his agents, and particularly so where, as here, a plaintiff was unconscious by reason of being under the effect of a general anesthesia, and therefore completely unable to testify as to what occurred. As was said in the Ybarra case, supra, "the particular force and justice of the rule * * * consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him (the defendant) but inaccessible to the injured person." (underscoring ours)

This jurisdiction has repeatedly held, that in cases of injuries inflicted by a mechanical apparatus or some other inanimate object within the defendant's exclusive control, that the doctrine of res ipsa loquitur permits a rebuttable inference of negligence to be drawn from the mere occurrence of an accident and the resulting injury. A prima facie case is thereby established to be submitted to the jury without other proof of negligence. See: Washington Loan & Trust Co. v. Hickey, 78 U.S. App. D.C. 59, 137 F.2d 677; Kerlin v. Wash. Gas Light Co., 110 F.Supp. 487, affd. 94 U.S. App. D.C. 39, 211 F.2d 649; Pennsylvania R. Co. v. Pomeroy, 99 U.S. App. D.C. 272, 239 F.2d 435; Loketch v. Capital Transit Co., 101 U.S. App. D.C. 287, 248 F.2d 609.

Almost 35 years ago, this Court held, in Gunning v. Cooley, 58 App. D.C. 304, 305, 30 F.2d 467, in affirming a jury verdict for a

plaintiff in a medical malpractice case, in which the plaintiff suffered injury from the injection of an acid in her ears (although the defendant doctor, and others, testified that he had injected only a drop or two of pure mineral oil):

> "The rules applicable to motions filed by defendants for a directed verdict in cases like this are well settled. 'The rule supported by the great weight of authority and by reason is that it is only where the court must say that, as a matter of law, no recovery can be had under any reasonable view of the evidence, that a verdict for the defendant will be directed.'
>
> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them.
>
> "It is true that there was no direct proof of the specific identity of the fluid which was injected by defendant into plaintiff's ears, but it was competent for the jury to determine from all of the circumstances disclosed by the evidence whether it was a harmless mineral oil or a dangerous and destructive fluid, and, if the latter, whether the defendant was negligent in administering such treatment to the plaintiff. It is plain that in many cases a patient, if in fact injured as plaintiff claims to have been, could have no other kind of evidence upon which to rely."

The big claim of the defendant in Gunning v. Cooley, supra, was that the trial court there should have directed a verdict for the defendant. Defendant applied for, and was granted certiorari by the United States Supreme Court, which Court, in Gunning v. Cooley, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L.Ed. 720, affirmed the jury verdict for the plaintiff, and quoted liberally from the opinion of this Court. The Supreme Court also stated:

> "The evidence shows that, while difficult to do, it would be possible by means of a dropper, to apply acid to ear drums without allowing it to come in

contact with other tissues. There was no scar or anything to indicate that acid had touched any part of the canal leading to either ear drum. Plainly it would have been impossible for the defendant to have closed the external ears without allowing the liquid used for that purpose to touch the canal tissue. But plaintiff was not required specifically to show what defendant did put in her ear or that the treatment destroyed either of her ear drums or made her deaf. If the evidence was sufficient to justify a finding that defendant negligently put a harmful fluid in her ears causing her pain and injury, the motion was properly denied.

"As the credibility of witnesses and the weight to be given their testimony are for the jury, plaintiff's testimony as to the treatment and immediate effect upon her and the testimony of others as to her condition shortly afterwards, constituted sufficient evidence to warrant a finding that instead of oil defendant negligently put some harmful liquid into her ears thereby causing her pain, suffering and some injury in and about her ears. It was not necessary for the trial court in passing upon the motion to determine, and we need not consider, whether under the rules laid down in the decisions of this Court, the evidence was sufficient to warrant a finding that the perforation of either ear drum, or permanent deafness, resulted from defendant's treatment."

In Sweeney v. Erving, 35 App. D.C. 62, 43 L.R.A. (N.S.) 734, this Court stated:

> "There are exceptional cases where the result of an operation performed, if unexplained, may warrant an inference of negligence.
>
> "Thus, evidence showing that after a broken ankle was reset, the ankle was crooked and the ankle joint stiff, tends to prove negligence on the part of the physician in setting the ankle, which evidence should be submitted to the jury."

In Crist v. White, 62 App. D.C. 269, 66 F. 2d 795, this Court reversed the trial court for having directed a verdict for the defendant in a medical malpractice case, holding that while the failure of an

operation alone creates no presumption of lack of skill or care, it is a circumstance entitled to some consideration, when coupled with the other testimony.

In Grubb v. Groover, 62 App. D.C. 305, 67 F.2d 511, this Court again reversed the trial court for having directed a verdict for the defendant in a medical malpractice case, at the end of plaintiff's case, holding:

> "In our opinion, evidence that an X-Ray practitioner administered X-Ray treatment to a patient without remaining in the room or within hearing, which treatment resulted in a burn, as here, warrants a finding of negligence, unless satisfactorily explained. In other words, it is for the jury to determine the issue presented by such evidence and the explanation, if any."

In Weisenberg v. Hazen, 63 App. D.C. 398, 73 F.2d 318, this Court again reversed the trial court for having directed a verdict for the defendant in a medical malpractice case, at the end of the whole case, quoting from Gunning v. Cooley and Crist v. White, supra.

In Christie v. Callahan, 75 U.S. App. D.C. 133, 124 F.2d 825, this Court rejected the view that negligence in treatment might be shown only by the testimony of x-ray specialists, and held that the jury was entitled to consider the character of the injury and the statements of the attending physician in connection with the evidence of experts.

In Byrom v. Eastern Dispensary & Casualty Hospital, et al., 78 U.S. App. D.C. 42, 136 F.2d 278, this Court reversed a jury verdict for defendant in a medical malpractice case, holding that the trial court's instructions went too far because they in effect told the jury to ignore all of the evidence in the case save that of the doctors who testified as experts and to find for the defendant if the treatment administered by him squared with District of Columbia practice.

In the instant case, a review of the evidence at the close of plaintiff's case, as well as that evidence developed in the remainder of the case bearing on the warranty issue, will demonstrate that there was evidence in addition to the result, which presented a question for the jury to determine on the issue of negligence.

The defendant attempted to explain how the fracture had occurred (J.A. 49), but he also testified that he was not sure of the manner in which plaintiff's jaw was fractured (J.A. 49, 50, 52). There was testimony that the plaintiff had a decayed condition in her jaw and tooth (J.A. 46, 85), and a forming necrosis of the bone, a slow absorption of bone (J.A. 85). The defendant testified that although he had thousands of patients, and had extracted many teeth, he had only had 2 or 3 fractures of the jaw result (J.A. 40). The defendant, and the plaintiff's private dentist both recognized this plaintiff's impacted molar as a difficult case (J.A. 41). Yet only normal procedures were followed by the defendant.

Plaintiff, prior to this operation, had lived with this condition, being asymptomatic, for ten years, and only in recent months had it been indicated to her that an operative procedure for the removal of this tooth would be beneficial (J.A. 12).

But this was not an emergency procedure. This was not the case of a dental surgeon operating against time to save a patient from possibly fatal infection or other calamity. There was testimony that one tooth lay directly over another impacted tooth (J.A. 41), thereby increasing the alleged difficulty of the operation, meaning that two, rather than one, had to be extracted. There was an abundance of testimony to the effect that the plaintiff had a thin jaw (J.A. 38 & 88). There was even later testimony, from one of the nurses, that the plaintiff's jawbone was "tissue thin" (J.A. 104). From this evidence the jury could have inferred that the defendant should have exercised precautions above the normal procedures, and from his failure to do so, could have found

negligence. There was testimony from which the jury could have found that the defendant did not have experienced assistants at the time of this surgery (J.A. 99, 107). The defendant himself, who did the surgery, did not even know he had fractured plaintiff's jaw, as he heaved a sigh of relief and commented on the fact that he had done the job without fracturing the jaw, as he was washing his hands, only to be notified of the fact that something was wrong by one of his assistants, a layman (J.A. 110). There was testimony that first a hammer and chisel were used on the plaintiff's jaw (J.A. 43), and later a drill (J.A. 48), from which the jury could have inferred that more force than was reasonably necessary had been used by the defendant, thus causing the traumatic fracture. There was absolutely no corroboration of the defendant's opinion that the plaintiff's jaw fracture was caused by a muscular contraction, for the nurse who was then holding the plaintiff's jaw during the operation felt none (J.A. 105). In addition, although this was a surgical procedure with a patient under general anesthesia, there had been no written consent to the operation (J.A. 39), and there had been no fully informed oral consent given, as the defendant admitted that he had not explained the full procedure as the plaintiff would not have understood same (J.A. 42).

The trial court precluded the plaintiff from showing, through the defendant himself, how the two or three other fractured jaws sustained by his other patients had occurred, and also ruled out evidence from plaintiff as to how her prior fracture of the left jaw had occurred (J.A. 14). These evidentiary matters would have been material for consideration by the jury, as to whether same had occurred through trauma, or bone disease, and as bearing on the question of the defendant's approach in handling the particular surgery in the instant case.

One might even conclude, taking the defendant's story, as allegedly corroborated by his two nurses, that the defendant should have informed the plaintiff that it would have been a miracle if her jaw were NOT

broken during the contemplated procedure; in which event, such possibility being so great, according to the defendant, that such surgery should have been performed in a hospital where surgical repair of the broken jaw so readily anticipated could have been done immediately, while the patient was still under anesthesia, rather than have left her, as the evidence in this case showed, unattended for some three or four hours in a "recovery" room.

II.

The trial court erred in failing to instruct the jury, sua sponte, on the impropriety of defense counsel's closing argument.

At one point, defense counsel stated: "The defendant, Dr. Keaveny, would not be in court, nor would his counsel be here, if we felt in all good conscience that we had made a warranty to Mrs. Brown" (J.A. 117). At another point he stated: "Now, if in the situation to which I allude, any one of you is called upon to defend yourself, you would feel, I am sure, that your own good word against the plaintiff's was enough to balance the scales." (Tr. 374)

The inherent impropriety in such an argument is that it invites the jury to make their decision upon their own feelings rather than the factual evidence in the case and the law as given to them by the Court. In such cases as the present one, a jury's natural sympathy is with the medical or dental profession, the followers of Hippocrates who minister to their ailments. To go further and ask them to assume that they were the physician or dentist themselves, who is the subject matter of a legal controversy, far exceeds the bounds of propriety.

Further, defense counsel argued, and prejudicially commented on the negligence phase of the action, which at that posture of the case (final argument), was entirely out of the case by reason of the directed verdict. Plaintiff's counsel was prohibited from rebutting such

prejudicial argument in rebuttal, the trial judge thereby placing his stamp of approval on defense counsel's prejudicial argument.

To cite just two cases from this jurisdiction should be dispositive of this point. In Washington & O.D.Ry. Co. v. Dulany, 53 App. D.C. 67, 288 Fed. 421 (1923), this Court, although affirming a jury verdict for plaintiff in a personal injury action, where the point on appeal had been made by defendant complaining of the allegedly prejudicial comment of plaintiff's counsel in stating, "For suppression of evidence — can't talk about it?" held:

> "The overwhelming majority of the legal profession are most scrupulous in avoiding anything which might be construed as an imposition on the court as to law or facts, and that rule of conduct is even more binding on the professional conscience when it comes to the presentation of a case to a jury. Statements not warranted by the evidence are not likely to excite the passions or prejudices of a judge, who by training, education, and experience is on his guard against them. Such statements, however, when made to a jury, unlearned as to the rules of evidence, unaccustomed to the evaluation of evidence and more open to the influence of gratuitous remarks, endanger an impartial verdict, a consummation of which should be as distasteful to every member of the bar as it is to the judge on the bench. In the heat of argument, in the rare moments when the ardor of the advocate sweeps out of his mind his duty as an officer of the court, the tongue will say things which it were better to have left unsaid in the interest of fairness."

In Meyer v. Capital Transit Co., 32 A.2d 392 (1943), the Municipal Court of Appeals had occasion to consider this subject in a personal injury case where defense counsel, in final argument, stated: "We, the Capital Transit Company, do not want to cause injury to anyone. Accidents are unavoidable. Do you, members of the jury, for one moment think we would be here today if the Capital Transit Company thought there was any liability in the case?"

Although the verdict there was affirmed, the Municipal Court of Appeals nevertheless stated:

> "* * * unmistakably they (the remarks) tended to convey the impression that the Transit Company settles those claims against it in which it thinks there is liability.
>
> "The policy of the Transit Company in settling or defending claims was not in issue. There was no evidence before the jury on this question and had such evidence been offered it would have been rejected. While counsel are allowed a wide latitude in drawing deductions from the evidence, arguments must be based on the evidence or that which may be properly inferred from the evidence. If the argument was based on counsel's own personal experience, it was improper for that reason. If this argument were permitted then appellant's counsel might reply by giving his opinion of the Company's willingness or lack of willingness to settle what he considered valid claims. Obviously such statements would be of no aid to the jurors in determining the issues before them. Counsel should not state facts of his own knowledge or insinuate that he has knowledge of such facts. Statements not supported by admitted evidence tend to mislead the jury and are not to be commended."

This entire subject has been made the matter of an annotation in 70 A.L.R. 2d 935.

III.

The remaining statements of errors as set forth in the Statement of Points on Appeal, appear to be so obvious and patent as not to require the undue lengthening of this brief by the citation of cases or authorities in support thereof.

## CONCLUSION

Wherefore, in view of the errors above stated, and the authorities cited, it is respectfully submitted that the judgment below should be reversed, and the cause remanded for new trial thereof.

Respectfully submitted,

EARL H. DAVIS

Davis & Mendelsohn
504 Federal Bar Building
1815 H Street, N.W.
Washington 6, D. C.

*Attorney for Appellant*

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,490

GRACE FISHER BROWN,

*Appellant,*

v.

JOHN F. KEAVENY,

*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



H. MASON WELCH
J. HARRY WELCH
J. JOSEPH BARSE
WALTER J. MURPHY, JR.
JAMES A. WELCH

505 Investment Building
Washington 5, D. C.

*Attorneys for Appellee.*

## QUESTIONS PRESENTED

I.

Whether in a malpractice action against a specialist in oral surgery for damages because a fracture occurred following the surgical extraction of a very badly and most unusually impacted molar tooth a directed verdict is properly granted in favor of the surgeon absent any testimony by plaintiff, appellant, as to the accepted standards of practice and procedures or the violation of accepted standards of practice and procedure.

II.

Whether the doctrine of res ipsa loquitur applies in a malpractice action against a specialist in oral surgery where a fracture follows the extraction of a very badly and most unusually impacted and infected molar tooth, absent any evidence that appellant's impaction was of a simple or ordinary character or classification, and which extraction would not be followed by untoward results if customary practice and procedure was followed by the surgeon.

III.

Whether the doctrine of res ipsa loquitur applies in a malpractice action against a specialist in oral surgery in a case where following extraction of a very badly and most unusually impacted molar tooth, the plaintiff, appellant's, jaw was fractured, and in the face of uncontradicted testimony in plaintiff, appellant's, case that the impaction was very bad and most unusual and one of the worst seen by plaintiff, appellant's own dentist in twenty-three years of practice, and concerning which said dentist repeatedly informed plaintiff, appellant, that it would be difficult and dangerous to remove or extract.

IV.

Whether in a malpractice action against a specialist in oral surgery predicated upon three claims, namely, negligence, res ipsa loquitur, and warranty, the trial judge errs after having directed verdicts in favor of the defendant on the issues of negligence and res ipsa loquitur, by explaining to the jury as part of the court's instructions a clear explanation as to why the court did direct a verdict on said issues and why the jury is to receive the case only on the third and remaining issue of warranty.

# INDEX



## TABLE OF CASES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,490

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GRACE FISHER BROWN,

*Appellant,*

v.

JOHN F. KEAVENY,

*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## BRIEF FOR APPELLEE

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### STATEMENT OF THE CASE

The appellant sued the appellee, dental surgeon, for damages because of a fracture of the jaw which appellant received in the course of the removal of a most unusual impacted molar tooth by the appellee. The appellant charged specific negligence and also relied on res ipsa loquitur. On these aspects of the case, the trial court granted a directed verdict for the appellee. The appellant also charged the appellee with

a breach of warranty on which issue the jury gave a verdict for the appellee.

For ten years prior to the extraction by the appellee, the appellant was under the care of Dr. J. Edward Hurley for dental work, a dentist of twenty-three and one-half years experience (JA 82). Dr. Hurley took full mouth X-rays of the appellant at intervals of approximately every one to one and one-half years over the ten year period (JA 82). Over the years, Dr. Hurley had made it clear to the appellant that the impacted molar she had, would be most difficult to remove and would require the services of a specialist as it was so difficult Dr. Hurley would not undertake this extraction, although he had done other extractions on the appellant (JA 11), and that it should be left alone unless pathology or disease should develop because there was a possibility of a fracture (JA 86, 87). In 1958 X-rays of the impacted molar taken by Dr. Hurley revealed that a diseased condition in the impacted molar existed and so the molar must be extracted to avoid osteomyelitis (JA 85). Dr. Hurley thereupon referred the appellant to the appellee for the extraction (JA 28, 37).

On July 1, 1958, appellant came to the appellee's office to have the extraction which Dr. Hurley had said was required, the nature of which appellant understood (JA 11, 26). After appellant was seated, the appellee took an X-ray of the area of the impacted tooth. Both of the appellee's assistants were present (JA 13). The appellant testified that while she was seated in the dental chair, she told the appellee that she had had a broken jaw on the other side, previously, and inquired of the appellee whether there was any chance of him breaking her jaw (JA 13, 14), and further testified that she would have refused the extraction if she had been warned about the possibility of a jaw fracture (JA 15, 16). Appellant testified that the appellee stated he would not break her jaw (JA 29). The appellee testified that he informed the appellant that she had a very difficult problem and that he would, of course, endeavor not to break her jaw, but that this was a possibility in such a difficult

impaction (JA 38). The appellee's two assistants testified that the conversation was as the appellee stated it (JA 97, 109).

Appellee was called as an adverse witness and was interrogated about the dental instruments which were used on appellant, and about the manner of using them and the part played by the two assistants (JA 43-48). This was the only testimony as to the manner of extraction. Appellee was also asked whether he knew how or when appellant's jaw was broken and he testified he did not know the precise cause, but felt that it probably resulted from a muscle contracture after the tooth was removed (JA 49).

After the trial court directed a verdict for the defendant, appellee, on the issues of specific negligence and res ipsa loquitur, appellee's counsel requested that the court inform the jury of its action so that the jury would understand the limited evidence which would be presented on behalf of the appellee on the issue of the alleged warranty. This the court did (JA 95, 96).

In the course of final argument, both counsel informed the jury that negligence was not an issue for them to consider because it had been stated to be an issue on opening statements. The trial court in the course of his charge also pointed out to the jury that the issue in the case for the jury to determine is, "whether a warranty was given by the defendant, appellee, that he would not break this jaw of the plaintiff" (JA 393).

The court explained to the jury (JA 119, 120) why the court eliminated the issue of negligence and stated, "I want you to understand generally what the law is, about the liability of a physician or dentist, in order that you can properly understand the relatively narrow field which is before you for determination of the facts in this case."

On the issue of warranty as submitted to the jury, a verdict was returned in favor of the defendant, appellee, and the jury was polled.

## STATEMENT OF POINTS

I. The trial court properly directed the verdict at the close of the appellant's case on the issues of specific negligence and res ipsa loquitur.

II. The court properly instructed the jury as to the court's action with regard to the issues of specific negligence and res ipsa loquitur at the commencement of the appellee's case.

III. The trial court properly instructed the jury on the issues to be decided by the jury and properly instructed the jury specifically that negligence was not to be considered.

IV. The court properly permitted Dr. J. Edward Hurley to testify on cross-examination.

V. The trial court properly ruled that the argument of defense counsel was within the proper scope of advocacy.

## SUMMARY OF ARGUMENT

All of the testimony was to the effect that the surgical procedure required by the diseased condition of appellant's molar involved a very difficult and delicate operation in which there was inherent a risk of fracturing the appellant's jaw. On this state of the evidence, there could be no inference of negligence. The appellant presented no evidence on the propriety of the procedures followed by the appellee in effecting removal of the molar and there was, therefore, not one scintilla of evidence for a jury to consider on the alleged specific negligence.

The court and indeed both counsel properly informed the jury that the court, having granted a directed verdict with regard to negligence and res ipsa loquitur, had removed from the jury's consideration the negligence issues which had been put before the jury by opening statements.

The argument of appellee's counsel was within the accepted bounds of advocacy.

## ARGUMENT

### I

### The Court Properly Directed the Verdict at The Close of Appellant's Case on the Issues Of Specific Negligence and Res Ipsa Loquitur

The only testimony at the trial as to the manner of performing the surgical procedure on the appellant was adduced from the appellee, himself. This consisted merely of a recitation of the steps by which appellee performed the operation. No attempt was made by the appellant to show either by cross-examination of the appellee under Rule 43, or by the presentation of any other evidence that the procedures followed by the appellee were other than the accepted standards of practice for oral surgeons in like circumstances in the District of Columbia.

Appellant in her brief argues that only normal procedures were followed and that due to the unusual impaction of a molar that the appellee should have exercised precautions above the normal procedures. However, the record is bare of any evidence as to whether the procedures followed by the appellee were only normal as characterized by the appellant or whether they were precautions above the normal procedures. From the record in this case, all we have is the bare description of the procedures with no attempt on the part of the appellant to categorize these procedures by evidence. The only place these are categorized is in the testimony like argument of appellant in her brief. Having presented no evidence on the issue of whether the appellee used the proper standards of practice, it is difficult to see how the appellant can contend that the jury should have been allowed to guess whether the procedures followed by the appellee were proper or not.

On the issue of res ipsa loquitur the appellant relies on Ybarra v. The Spangard, 25 Cal. 2d 486, 154 P2d 687. The first requirement for the application of res ipsa loquitur as set forth in this case is, "the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence." Appellant had been repeatedly told

over a ten year period by her own dentist, Dr. Hurley, that the removal of the impacted molar would be an extremely difficult procedure and would require the services of a specialist in oral surgery. Dr. Hurley, himself, had done some extractions on the appellant's mouth, but he considered this particular tooth to be in such a dangerous position that he, himself, would not attempt the extraction. Both the appellee and Dr. Hurley testified that because of the very unusual nature of the impaction, that there was a possibility of fracturing the jaw in the course of the extraction. Clearly, this is not a situation where the injury would not have resulted except for negligence.

This court has held in the cases of Quick v. Thurston, (1961) 110 App. D.C. 169, 29 F.2d 360, and in Johnston v. Rodis, (1958) 102 App. D.C. 209, 251 F.2d 917, that the doctrine of res ipsa loquitur is not to be applied to professional malpractice cases because the result achieved is untoward. In Quick v. Thurston, this court quoted from the statements of public policy contained in the case of Ewing v. Goode, (1897) 78 F.442, wherein Judge Taft said:

> "If the maxim, 'res ipsa loquitur', were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial responsibility for nearly all the 'ills that flesh is heir to.' "

No attempt will be made to distinguish the citations relied upon by the appellant on this question even though they are clearly distinguishable, by their facts, as these recent decisions in Quick v. Thurston and Johnston v. Rodis clearly set forth the policy of this jurisdiction with regard to the application of res ipsa loquitur in a suit against a professional person. However, it is interesting to note that the major thrust of the appellant's argument for the application of the doctrine of res ipsa loquitur was made moot more than twenty years ago by the adoption of the discovery procedures available under the Federal Rules of Civil Procedure. Before the adoption of these rules, there may well

have been a valid basis for a broad application of res ipsa loquitur in order to require a defendant to disclose and explain the accident in situations where a defendant was peculiarly in control of the instrument and the plaintiff had no knowledge of its management or mismanagement. Today the knowledge of a defendant is easily obtained by the plaintiff before trial by use of the discovery procedures or at trial by the use of Rule 43 of the Federal Rules of Civil Procedure. There is, therefore, no necessity for using the doctrine of res ipsa loquitur as a method of requiring the defendant to go forward with his proof.

In the instant case the appellee was required by the diseased condition of this molar and surrounding bone as diagnosed by Dr. Hurley, to attempt the removal of the tooth from its surrounding bone, an operation which the appellee and Dr. Hurley both described as very difficult and delicate so there can be no basis for allowing a jury to infer that the operation was done negligently, simply because of a bad result.

## II

### The Court Properly Instructed the Jury as to the Court's Action with Regard to the Issues of Specific Negligence and Res Ipsa Loquitur at the Commencement of the Appellee's Case.

Following the court's action in directing a verdict on the issues of specific negligence and res ipsa loquitur, the appellee's counsel requested that the court inform the jury of the court's action so that the jury might understand why no evidence was presented by the defendant, appellee, on these issues which had been put before the jury by appellant's counsel in his opening statement. Clearly the court's action in putting the case in its then proper perspective for the jury was a legitimate exercise of the court's discretion, if it were not mandatory on the court.

III

**The Trial Court Properly Instructed the Jury on The Issues to Be Decided by the Jury and Properly Instructed the Jury Specifically That Negligence Was Not to Be Considered.**

The appellant in her brief states that the court committed error in its charge to the jury in both explaining the law on the issue of warranty which was being submitted to the jury and in pointing out to the jury that the issues of specific negligence and res ipsa loquitur were not to be considered by the jury. However, the appellant has not seen fit to enlighten this court or appellee's counsel as to why the court's charge was erroneous. The appellant in the brief filed in this case states that these errors are so obvious and patent as not to require argument. It seems rather cavalier to state that the actions of a judge of the United States District Court are so erroneous as to fairly leap out of the record to stand before the eyes of this court. It appears to the appellee that it is the duty of the appellant to delineate the specific errors she alleges were committed in the trial of this case and it is not incumbent upon the appellee to write a lengthy treatise defending the court's instructions.

IV

**The Court Properly Permitted Dr. J. Edward Hurley to Testify on Cross Examination.**

Dr. Hurley attended to the dental needs of the appellant for ten years prior to the incident complained of in this suit and was on the date of his testimony some twenty-three and a half years in practice as a dentist. The statement of the doctor's connection with the case and his experience would seem to fit him generally to testify in this case. Again, we are not informed by the appellant as to what testimony of Dr. Hurley is specifically objected to, so, therefore, no specific argument can be made in support of the propriety of his testimony, other than to

point out as we have done, the doctor's knowledge and experience and the general and accepted rule that whether a physician may testify on any subject requiring expert knowledge is within the discretion of the trial court.

## V

## The Trial Court Properly Ruled That the Argument Of Defense Counsel Was Within the Proper Scope of Advocacy

Appellant complains about the portion of the argument by counsel for appellee which in a straight forward and moderate manner brought into clear perspective the only remaining issue to be determined by the jury, that is, whether appellee made a warranty to appellant, guaranteeing to her that she would not sustain a fracture of the jaw as a result of the extraction of the grossly impacted molar tooth and pointed out to the jury that the case was stripped of two very serious charges made against appellee by appellant's counsel in the opening statement to the jury at the outset of the trial (JA 120, T 393).

It is respectfully submitted that the language of said argument will speak for itself. It was moderate, proper, and simply calculated to put the case in its proper posture and light at that point. Counsel for appellee certainly had the right and duty to point out that the serious charges based upon negligence which had been projected at the start of the trial by appellant's counsel, had entirely failed and to emphasize that appellee denied in toto appellant's claim with respect to a warranty.

The trial judge was in the best position to determine in the light of the circumstances and status of the case whether the argument of appellee's counsel was permissible and proper or objectionable.

Appellant's counsel also makes some point that the trial judge, sua sponte, precluded his attempted argument in rebuttal (JA 119). It will be seen from a reference to the transcript that appellant's counsel

at the point complained of had apparently started to assert the argument that the appellant could not have gotten dentists in the District of Columbia to testify adversely to appellee as to appellee's procedures. We submit that it requires no argument to support the action of the trial judge in this instance. On the face of it, such argument is highly improper and prejudicial and the trial judge simply forestalled, by sua sponte action, a possible motion for mistrial.

## CONCLUSION

The appellee respectfully submits that the rulings and instructions of the trial judge should be sustained and the verdict and judgment for the appellee be affirmed.

Respectfully submitted,

H. MASON WELCH

J. HARRY WELCH

J. JOSEPH BARSE

WALTER J. MURPHY, JR.

JAMES A. WELCH

505 Investment Building
Washington 5, D. C.

*Attorneys for Appellee.*

JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 17,490

---

GRACE FISHER BROWN,

*Appellant,*

v.

JOHN F. KEAVENY,

*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## JOINT APPENDIX

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# INDEX

Excerpts from Transcript of Proceedings (Cont'd.):

# JOINT APPENDIX

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[Filed July 16, 1959]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE FISHER BROWN,
4013 Davis Pl., N.W.,
Washington, D. C.,

and

GEORGE BROWN,
4013 Davis Pl., N.W.,
Washington, D. C.,

Plaintiffs,

vs.

JOHN F. KEAVENY,
1726 Eye St., N.W.,
Washington, D. C.,

Defendant.

Civil Action No. 1929-59

COMPLAINT [Damages for Personal Injuries]

COUNT 1

1. This Court has jurisdiction of the cause, the matter involved being in excess of $3,000.00.

2. That on, to wit, July 1, 1958, the plaintiff, Grace Fisher Brown, was a patient of the defendant, John F. Keaveny, a practicing dental surgeon in the District of Columbia, at his office located 1029 Vermont Ave., N.W. in the District of Columbia, for the purpose of extracting a tooth of the plaintiff. That the defendant administered an anesthetic to the plaintiff which immediately made plaintiff unconscious and he then negligently and carelessly extracted the tooth of plaintiff, which caused the plaintiff's jaw to be fractured.

3. The injuries sustained by plaintiff as aforesaid, consisted of a fractured jaw with permanent injury thereto, severe and permanent injury to her nervous system, permanent disfigurement of her face, and great physical and mental pain and anguish. Plaintiff lost much time from her employment and will in the future lose time from her employment. That she has expended money for medical and hospital treatment and will expend money in the future for said treatment as the result of the aforesaid injuries sustained by her, all to the damage of Grace Fisher Brown in the sum of $125,000.00.

4. The plaintiff, George Brown, is the husband of the plaintiff, Grace Fisher Brown, and by the reasons of the injury sustained by his wife as aforesaid, has lost and will lose in the future her society and consortium, all in the damages of the plaintiff, George Brown, in the sum of $15,000.00.

Wherefore, the plaintiff, Grace Fisher Brown, demands judgment of the defendant in the sum of $125,000.00, besides costs.

Wherefore, the plaintiff, George Brown demands judgment of the defendant in the sum of $15,000.00, besides costs.

COUNT 2

1. The plaintiffs repeat and re-allege as part of this Count all allegations set forth in paragraphs 1, 2, 3, and 4 of the 1st Count, and in addition thereto alleges:

2. That on July 1, 1958 when in the office of the defendant as aforesaid in the 1st Count feeling much concern about the extraction of her tooth, having previously had a fractured jaw, she questioned the defendant whether it was safe to pull said tooth, and whether she would have bad effects as the result of the extraction, and whether her jaw would be fractured in the procedure. She was told by the defendant and assured that it would be perfectly safe to extract the tooth, and he would not fracture her jaw in doing so.

3. The plaintiff relied upon the statement made to her by the defendant and therefore submitted herself to the defendant for the aforesaid

extraction. That the plaintiff was administered an anesthetic by the defendant and immediately became unconscious. That upon regaining consciousness she was informed by the defendant that he had fractured her jaw.

/s/ Martin Mendelsohn
Attorney for Plaintiffs

* * *

DEMAND FOR JURY TRIAL

PLAINTIFFS DEMAND TRIAL BY JURY.

/s/ Martin Mendelsohn

---

[Filed Sept. 14, 1959]

ANSWER TO PLAINTIFFS' COMPLAINT

Now comes the defendant, John F. Keaveny, by his counsel, and for answer to plaintiffs' complaint in the above-captioned matter, states:

FIRST DEFENSE:

Defendant says that plaintiffs' complaint fails to state a cause of action in either Count 1 or Count 2, upon which relief may be granted.

SECOND DEFENSE:

Defendant denies each and every other allegation of negligence as to Counts 1 and 2. Defendant states as to both counts that the professional treatment rendered to and for the plaintiff, Grace Fisher Brown, was properly, carefully and skillfully done and entirely in accord with approved methods and standards of practice for like conditions.

THIRD DEFENSE:

As it may be applicable to Count 1 of said complaint and with particular reference to Count 2 of said complaint, defendant denies that he told said plaintiff, Grace Fisher Brown, that it would be perfectly safe

to extract her tooth and that he would not fracture her jaw in doing so; defendant denies that he made any similar representations or assurances to said plaintiff. On the contrary, defendant avers that he specifically advised and informed said plaintiff of the serious and difficult conditions existing after having taken X-ray pictures and made a careful clinical examination. Said plaintiff was specifically informed of the possibility of her jaw being fractured during the extraction of her teeth. Said plaintiff, knowing and understanding full well the advice and warning given by defendant, agreed and consented to the procedures, saying to defendant that she had previously had a fracture of the left side of her jaw and hoped that she did not have one on the right side. Defendant specifically denies that he advised said plaintiff that it was safe to pull said tooth or that he gave her any assurances of any kind to that effect or that there would not ensue bad effects as a result of the extraction.

Defendant avers that the fracture of plaintiff's right mandible, or the right side of plaintiff's jaw, resulted solely and entirely because of the condition of plaintiff's teeth and jaw and was a hazard of the operation well known to plaintiff before said operation and specifically accepted by her after competent advice.

As to both counts 1 and 2 of said complaint, defendant denies each and every allegation of both plaintiffs as to losses and damages and denies that plaintiffs suffered any injury, loss or damage because of any act of carelessness or neglect on the part of defendant.

WELCH, DAILY & WELCH

By: /s/ H. Mason Welch
Attorneys for Defendant

* * *

[Certificate of Service]

[Filed June 7, 1960]

## PLAINTIFFS PRETRIAL STATEMENT

### OCCURRENCE

That on July 1, 1958, the plaintiff, Grace Fisher Brown, was a patient of the defendant, Dr. John F. Keaveny, a Dental Surgeon, for the purpose of extracting an impacted tooth. That the plaintiff was given an anesthetic which immediately made her unconscious. That the defendant negligently and carelessly extracted said tooth causing the plaintiff's jaw to be fractured.

### LIABILITY

Res Ipsa Loquitor

Warranty

### INJURIES

Fracture with displacement of the right mandible, necessitating two operations on the jaw. Jaws wired on two different occasions for a period of six weeks on each occasion.

Infection of jaw

Defect in occlusion of upper and lower teeth.

Blurring of vision, headaches.

Pain, suffering, mental anguish and nervousness

PERMANENT: Weakness and limitation of motion of jaw, and limitation of function of jaw; Malocclusion of jaw.

### SPECIALS

| | | |
|---|---|---|
| Washington Hospital Center | | $ 988.10 |
| Dr. George Tievsky (x-rays) | | 95.00 |
| Dr. John Swanson | | 40.00 |
| Dr. Arthur Dick, Plastic Surgeon | | 600.00 |
| Dr. Harvey Ammerman, Neuro Surgeon | | 25.00 |
| Dr. Arthur Greenfield | | 650.00 |
| Dr. Edward Hurley, Dentist -temporary bridge | | 30.00 |
| Loss of earnings -- Union Station. | | |
| 29 weeks @ $85.73 per week | $2,486.17 | |
| When she resumed work, her loss of earnings were $33.23 per week for 12 weeks | 398.76 | |

| | | |
|---|---|---|
| April 1959 to Jan. 21, 1960 loss of earnings were $30.73 per week for 32 weeks | $ 983.36 | |
| Loss of earnings Jan. 1960 to April, 1960 at $23.23 per week--12 weeks | 278.76 | |
| Total loss of earnings | | $4,147.05 |
| Future operation and post-operative care | | 550.00 |
| Future loss of earnings after the above operation | | 450.00 |
| Total Specials | | $7,625.15 |

George Brown, husband of Grace Fisher Brown claims loss of his wife's consortium and services.

STIPULATIONS

Hospital Records and Bills

X-rays and X-ray Bills

Mortality Table

Photographs

/s/ Martin Mendelsohn
Attorney for plaintiffs

* * *

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[Filed March 27, 1961]

DEFENDANT'S PRETRIAL STATEMENT

Defendant admits that on, to-wit, July 1, 1958, female plaintiff was a patient of the defendant. The defendant admits that the female plaintiff was his patient for the purpose of having a tooth extracted. Defendant admits that in the course of the extraction of this tooth, female plaintiff's jaw was fractured.

Defendant denies any and all negligence and avers that his treatment was in accord with the proper and accepted medical standards for dentists practicing in the District of Columbia in 1958. Defendant avers that the female plaintiff assumed the risk.

The defendant denies that he assured female plaintiff that it would be perfectly safe to extract the tooth and that there was no danger of fracturing her jaw. The defendant avers that the female plaintiff was advised that there was considerable risk in the procedure because of the position of the tooth and states that the female plaintiff was advised of this risk by Dr. Hurley, who recommended that she see Dr. Keaveny for this extraction and also that she was so advised by the defendant, Dr. Keaveny.

The defendant denies that the plaintiff was damaged as alleged, with the sole exception that the defendant admits the plaintiff's jaw was fractured.

WELCH, DAILY & WELCH

BY: /s/ H. M. Welch

/s/ Walter J. Murphy, Jr.

[Certificate of Service]

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[Filed March 29, 1961]

PRE-TRIAL PROCEEDINGS

3/29/61

Tort for personal injuries (malpractice).

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS:

On July 1, 1958, the female P was a patient of the D, a dental surgeon for the purpose of extracting a tooth. During the course of the extraction of the tooth, female P's jaw was fractured.

---

P CLAIMS that her injury and the damages sustained by her were caused by the negligence of the D or his breach of warranty. The negligence was predicated on the doctrine of res ipsa loquitur.

---

DEFENDANT denies any negligence and asserts that his treatment was in accord with proper and accepted medical standards for dentists practicing in the D of C at the time of the incident; asserts that the P assumed the risk of injuries and damages having been advised both by her own dentist and the D that there was considerable risk in extracting the tooth because of its position in the jaw. D denies assuring female P that it would be safe to extract a tooth and that there was no danger of fracturing her jaw and denies that the P was damaged, as claimed, except that he admits her jaw was fractured; denies that the doctrine of res ipsa loquitur applies to a case involving medical treatment and denies any consideration which would be a basis for a breach of warranty.

---

P'S INJURIES

Fracture with displacement of the rt mandible, necessitating two operations on the jaw. Jaws wired on two different occasions for a period of six weeks on each occasion; infection of jaw; defect in occlusion of upper and lower teeth; blurring of vision, headaches; pain, suffering, mental anguish and nervousness.

PERMANENT: Weakness and limitation of motion of jaw, and limitation of function of jaw; malocclusion of jaw.

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SPECIAL DAMAGES

Washington Hospital Center, $988.10; Dr. George Tievsky (x-rays) $95.00; Dr. John Swanson, $40.00; Dr. Arthur Dick, Plastic Surgeon, $600.00; Dr. Harvey Ammerman, Neuro Surgeon, $25.00; Dr. Arthur Greenfield, $650.00; Dr. Edward Hurley, Dentist - temporary bridge, $30.00; Loss of earnings - Union Station. 29 weeks at $85.73 per week, $2,486.17; When she resumed work, her loss of earnings were $33.23 per week for 12 weeks; April 1959 to Jan. 21, 1960 loss of earnings were $30.73 per week for 32 weeks, $983.36; Loss of earnings Jan. 1960 to April 1960 at $23.23 per week - 12 wks. $278.76. Total loss of earnings,

$4,147.05. Future operation and post-operative care, $550.00; future loss of earnings after the above operation, $450.00; Total Specials, $7,625.15.

The P dismisses the claim of the male P for consortium and loss of services.

---

STIPULATIONS

The following may be introduced in evidence without formal proof subject to objections as to materiality and relevancy: x-ray plates; photographs, initialled by Examiner subject to any other proper legal objections; HEW Mortality Tables.

P has a number of bills and documents, which have been initialled by Examiner, which he requests that the D stipulate to as to admissibility in evidence but D can make no agreement in this area.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

/s/ Martin Mendelsohn, Counsel for Plaintiff
/s/ H. M. Welch, Counsel for Defendant

/s/
Pretrial Examiner

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[Filed Dec. 18, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Tuesday, September 25, 1962

The above-entitled cause came on for trial before THE HONORABLE EDWARD A. TAMM, United States District Judge, and a jury.

* * * * *

9 MR. WELCH: I would like to make one or two observations and motions, Your Honor. Counsel has suggested that he intends to rely upon the doctrine of res ipsa loquitur. But he has not announced to the Court and jury that he intends to prove anything upon which he might rely upon said doctrine. The doctrine in a case of this kind, as I understand the law, would only apply if the operation done by the doctor was of such a character that in the absence of negligence this result would not pertain. I think it is incumbent upon the plaintiff, to rely upon the doctrine of res ipsa loquitur, in this case, that he show this type of extraction is ordi-
10 narily accomplished by a careful, prudent, competent oral surgeon without complications or difficulty. Therefore I think that we should understand at this time whether he is to be permitted to proceed under the theory of res ipsa loquitur. We are not undertaking to firmly establish the basis upon which the doctrine should rest.

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11 MR. WELCH: He knows that she didn't just go in to have any tooth pulled. He knows she had a very badly impacted tooth. He knows he is going to have to show ordinarily a tooth of this kind can be removed by a capable and competent physician without complications, because this isn't the situation where the jurors or the Court may take judicial notice of it.

* * * * *

13 GRACE FISHER BROWN

called as a witness in her own behalf, being duly sworn, was examined and testified as follows:

14 DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. * * * * *

Mrs. Brown, will you state your full name, please. A. Grace Fisher Brown.

* * * * *

Q. Now, on July 1, 1958, prior to that time, will you tell us where you were employed? A. I had been employed at the Washington Terminal Company, for approximately eight years.

Q. And what kind of work did you do there? A. I gave information and made reservations via the telephone and through the ticket windows.

15 Q. What were your earnings at that time, Mrs. Brown? A. My gross earnings were approximately $85, or a little more.

Q. Was that a week? A. That is correct.

Q. Now, do you know a dentist, Dr. E. J. Hurley? A. Yes. Dr. J. Edward Hurley had been my doctor -- dentist, I should say -- since approximately 1948.

Q. And in that time, will you tell the Court and the jury just what work he performed on you. A. He did my dental work.

* * * * *

16 Q. Mrs. Brown, while you were going to Doctor Hurley, did he at any time extract any teeth from your mouth? A. Yes.

* * * * *

A. Yes. From time to time he has extracted a few teeth.

* * * * *

Q. Mrs. Brown, did he at any time X-ray your teeth? A. He X-rayed my teeth periodically as a check-up.

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17 Q. Mrs. Brown, do you recall how many times your teeth were X-rayed by Doctor Hurley? A. Approximately once a year in that period of time.

Q. And was that on check-ups that you would go to Doctor Hurley for? A. That is correct.

* * * * *

18 Q. Do you recall, Mrs. Brown, when this last X-ray was taken by Doctor Hurley? A. The last X-ray was taken in the spring of 1958.

Q. And as a result of taking those X-ray pictures, did you go to see another doctor -- dentist? A. Yes, I did, on Doctor Hurley's advice.

19 Q. And what was the name of this dentist? A. The dentist was Doctor Keaveny.

Q. Had you ever seen Doctor Keaveny prior to this time? A. No, I had not.

Q. Now, when this X-ray was taken of your teeth on the last time by Doctor Hurley, what tooth was this?

* * * * *

20 A. The tooth in question was a right lower, which was an impacted tooth, and Doctor Hurley --

THE COURT: Just answer the question.

BY MR. MENDELSOHN:

Q. Did you say a right molar? A. That is correct.

Q. Prior to this time that Doctor Hurley took this last X-ray, had you ever had any pain in this particular molar? A. No, sir.

* * * * *

Q. Tell us what happened, will you please, when you first went to Doctor Keaveny's office.

THE COURT: Do you want to establish the time or date?

BY MR. MENDELSOHN:

Q. When was this, Mrs. Brown? A. July 1, 1958.

21 Q. And ten o'clock in the morning, was this? A. That is correct.

Q. Now, just tell us what happened in Doctor Keaveny's office.
A. Well, nothing. I waited for almost an hour and nothing happened.

Q. Did there come a time when you saw Doctor Keaveny?
A. Finally, after eleven o'clock, some time after eleven I did see him.

Q. And did you have any conversation with Doctor Keaveny at that time? A. As I walked through his room, he introduced himself, and I asked him what the delay was. And he stated there had been some trouble there that morning.

Q. Now, Mrs. Brown, were his two attendants present at that time?
A. Yes, they were.

Q. Do you know their names? A. I believe it was a Miss McMullin and Miss McCormack.

Q. And were you taken to a certain room in Doctor Keaveny's suite? A. Yes, I was.

Q. Do you recall what room that was? A. It was a small room, corner room, faced Vermont Avenue and L Street.

Q. Were you seated on his chair? A. Yes, I was.

Q. Did Doctor Keaveny come in the room later, or was he in this small room when you arrived? A. He came in later.

Q. Where were these two attendants of his? A. They were both in the room.

Q. And then tell us what happened. A. Then Doctor Keaveny X-rayed the tooth.

Q. Did you see the development of that tooth later? Did he show you any pictures? A. Yes, he did.

Q. How did he show you these pictures, do you recall? A. He held the X-ray up to the light, to the window.

Q. And at that time did he make any statement about this X-ray picture of this molar? A. He made no comment whatsoever.

Q. Now while you were seated in his chair, Mrs. Brown, I want you to tell the Court and jury just what happened and what the conversation was at that time. A. As Doctor Keaveny had this X-ray up to the window he made no comment, so I asked him if there was any chance of

him breaking my jaw. I stated that I had had a broken jaw in my past lifetime and I did not want to go through that again.

23 Q. Now, did you have a broken jaw prior to this occasion?

A. Yes, sir.

Q. And when was this? A. I believe it was in '56, January or February of '56.

* * * * *

Q. Mrs. Brown, after you fractured your jaw, the first time, what was your physical condition? Following that?

MR. WELCH: I object to that.

THE COURT: I don't think this is material, Mr. Mendelsohn.

MR. MENDELSOHN: May we approach the bench, if Your Honor please?

THE COURT: You may.

(At the bench:)

THE COURT: The Court has permitted you to establish the prior break as being the reason or the justification for the witness asking this question of the doctor. I don't think, however, that the details of the pain and suffering or anything is material to this case.

24 MR. MENDELSOHN: Your Honor, the purpose of the question is such that she had so much pain in her other operation that she is going to testify that she would never let Doctor Keaveny operate on her jaw if he had made that statement that there was a possibility of breaking her jaw.

THE COURT: I think you will have to ask a direct question on this point if you want to put it in the record. But I don't think the Court can take the time to hear details of the pain and suffering at the previous accident.

* * * * *

25 BY MR. MENDELSOHN:

Q. Mrs. Brown, you stated that while you were seated in the chair in Doctor Keaveny's office, and after he took these X-ray pictures, that you asked him if there was any chance of him breaking your jaw; is

that correct? A. That is correct. When he held the X-ray up he made no comment. Therefore I asked him point-blank if he was going to break my jaw, and he indicated he was not by saying no.

Q. What was that response to that question that you asked him, that he wasn't going to break your jaw? A. He said no, that he wasn't.

Q. Will you tell us why you asked Doctor Keaveny that question? A. I asked him that question because I had suffered a broken jaw in the past, and at that time --

* * * * *

26 Q. What was your conversation with Doctor Keaveny, after he told you he was not going to break your jaw? A. Well, I had said at that time that I had suffered, when I had a broken jaw previously, and I told him that was my reason for asking that question.

Q. Did he at any time warn you, Mrs. Brown, that there was a possibility, probability, that your jaw could be broken in this procedure?

MR. WELCH: If the Court please, I object to leading the witness in this manner. I think if there is any further conversation that was had, she may testify to it and state what it was.

THE COURT: The objection to the form of the question is sustained.

BY MR. MENDELSOHN:

Q. Did Doctor Keaveny warn you in any manner?

MR. WELCH: Same objection.

THE COURT: The objection is overruled.

Answer the question.

[THE WITNESS:] He didn't warn me at all.

BY MR. MENDELSOHN:

Q. Did you sign any instrument in Doctor Keaveny's office that he may have presented to you, or any of his attendants, concerning the taking of this general anesthetic? A. I didn't sign anything.

27 Q. You did not sign any instrument whatsoever? A. No, I did not.

Q. Now, in view of your prior traumatic experience that you had with your jaw on the other side of your face, Mrs. Brown, if Doctor

Keaveny had warned you of any possibility of a broken jaw from his extraction of this tooth, would you have gone through that operation?

MR. WELCH: Object to that, if the Court please.

THE COURT: State the ground for your objection.

MR. WELCH: I think it is utterly immaterial whether she would have consented to follow the advice of other physicians and surgeons and gone through an extraction.

THE COURT: The objection is overruled.

Answer the question.

THE WITNESS: Mr. Mendelsohn, will you state that again?

THE COURT: Read the question, Madam Reporter.

(The pending question was read by the reporter.)

[THE WITNESS:] No, indeed, I would not. I would have got up and walked out.

BY MR. MENDELSOHN:

Q. Now, do you remember Doctor Keaveny giving you any anesthesia? A. Yes. Doctor Keaveny gave me the anesthesia.

28 Q. Do you recall what it was, if you know? A. It was in my arm. Sodium pentothal, I believe, but no one made any mention of what type of anesthesia I was to receive.

Q. What happened to you, Mrs. Brown, when this shot was administered in your arm? A. I don't remember anything after he gave me the shot.

Q. Now, did you at any time come out of this anesthesia while this operation was being performed and while Doctor Keaveny was extracting your tooth? A. Yes, I did.

Q. Will you tell us just what happened at that time. A. I came out of the anesthesia momentarily and as I did Doctor Keaveny and his two nurses were all hovering over me, and Doctor Keaveny was saying, "Can you see it? Can you get it?" They were all trying to get their hands in my mouth at one time. I was in pain, when I came out of sodium pentothal sitting up, I always want to throw up, and that is what happened.

Q. Did you throw up at that time? A. No. Then immediately he gave me another needle.

Q. After he gave you the second shot, Mrs. Brown, do you recall anything that took place while you were seated in that chair? A. No, I don't.

29 Q. Will you tell us, Mrs. Brown, what the next thing is that you remember? A. The next thing I remember is coming to in the hospital.

Q. What hospital was this? A. Washington Hospital Center.

Q. Now, when you came to at the Washington Hospital Center, was Doctor Keaveny at the hospital? A. No, he was not.

* * * * *

Q. What happened the first few days? A. Well, Doctor Greenfield and Doctor Dick both were there but it is very vague to me what was happening.

Q. Do you recall what was done to you while you were in the hospital? A. After I came to enough to realize, I had this huge bandage on my neck. They had already made this incision before I knew anything about it, in my neck. And then after several days they wired my teeth.

Q. Do you know who had made that incision on your neck?

A. Dr. Arthur Dick.

Q. He is a plastic surgeon, is he? A. That is correct.

Q. Now, did you talk to Doctor Dick at any time after you found

30 out he had made that incision on your neck? A. Yes. But there was not much he could do at that time.

* * * * *

Q. Did you have a conversation with Doctor Dick as to what he did for you? A. Yes. He had set the jaw as well as he could.

Q. And how long did you remain in the hospital, Mrs. Brown?

A. The first time approximately ten days.

* * * * *

Q. Mrs. Brown, I show you Plaintiff's Exhibit No. 1. Will you tell us what that is, please.

* * * * *

A. This is X-ray that Doctor Hurley made. The last X-ray before this happened.

31 BY MR. MENDELSOHN:

Q. I show you this, Mrs. Brown, marked Plaintiff's Exhibit No. 2 for identification. What is that? A. This is a positive picture of that negative, of this same jaw, same tooth.

* * * * *

Q. Now, Mrs. Brown, will you tell us what was done to your mouth, while you were at the Washington Hospital Center, following July 1, 1958. A. We eventually got there for a few days. They attempted to wire it. However, before they wired my mouth, there were fragments of stitches, cotton and either bone or teeth fragment in my mouth which I requested a doctor to remove and not one of the doctors would remove it.

Q. Now, did there come a time when it was removed? A. No, it never was.

Q. What was done to your mouth then? A. It was wired.

32 Q. Who wired it? A. Dr. Arthur Dick wired it.

Q. Now, how long did you remain in the hospital at that time? A. At that time, approximately ten days.

Q. And will you tell us how you felt while you were in the hospital for those ten days? A. For the first part of the ten days I didn't know one day from the other. And eventually, after a few days I got so I would see two people, and I just was under anesthetic apparently so much I didn't know what was happening. But I was in agony most of the time. After that they decided why I couldn't see and so forth; they took all of the anesthetic away from me and the only thing they gave to me to relieve the pain was ice.

Q. Were you able to eat anything at the time you were in the hospital? A. Through a straw, liquids.

Q. When you returned home, following your stay in the hospital, tell us how you felt at home, will you please. A. Well, I was very weak. I could not eat. And I was in constant pain. I had terrible headaches, and a constant pull on my jaws, from the wires.

Q. How did you eat, Mrs. Brown? A. I ate through a straw. Liquids.

* * * * *

33 Q. I show you Plaintiff's Exhibit No. 3, 4 and 5, Mrs. Brown. Will you kindly look at those photos and tell us who they are. A. These are photos of myself, taken shortly after I came from the hospital, after the first operation.

Q. Was your mouth wired up when these photos were taken? A. Yes, it was.

MR. MENDELSOHN: Introduce these photos in evidence, if Your Honor please.

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MR. WELCH: No objection, Your Honor.

THE COURT: The exhibits will be admitted.

(Plaintiff's Exhibits No. 3, 4 and 5 for identification received in evidence.)

* * * * *

34 BY MR. MENDELSOHN:

Q. Did there come a time when you went back to Washington Hospital Center again? A. Yes; approximately October 1st, 1958.

Q. And why did you go back to the hospital? A. I went back for an intended another operation, but it so happened that I had a terrible infection in my neck, in this same incision, and they could not operate. They merely lanced that and curtailed the infection.

Q. How long were you in the hospital for this? A. Approximately two days.

Q. You say they lanced what, Mrs. Brown? A. They went through this same incision again. Apparently they could see the infection.

Q. Did they treat you through that incision? A. That is correct.

Q. Will you tell us, as far as pain is concerned, was that painful? A. This was more painful, or at least as painful as any of the other operations.

Q. Now, when you returned home, after this infection was treated, will you tell the Court and jury just how you felt for a period of a month or so following this. A. I would still have terrible headaches and my jaw would ache, and I still could not eat too well.

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35 Q. Now, do you know Doctor Greenfield? A. Yes; Doctor Alfred Greenfield.

Q. And did he treat you for anything whatsoever during this occurrence? A. During this period of time Doctor Greenfield gave me intravenous shots of vitamins, and gave me things for pain.

* * * * *

Q. Mrs. Brown, did you ever return to the hospital again?
A. Yes; approximately October 15, 1958.

Q. And prior to returning to this hospital in October '58, what was your physical condition? A. Well, I have never been very well since this.

Q. Prior to the time you went back to the hospital, will you kindly
36 tell the Court and jury how you were feeling? A. You mean between October 1st and October 15th?

Q. That is right. A. Well, as I say, I still had aches and pains in this jaw.

Q. And what was done to you at the hospital in October, the 15th of October, '58? A. October 15, 1958, Dr. Arthur Dick operated again in the same place.

Q. And in that operation, did he have to give you an incision on your neck again? A. Yes. He went through the same incision again.

Q. Had that incision been healed prior to the last time he performed that? A. Yes, it had.

Q. And tell us what he did, if you know, the last time you went to the hospital. A. Well, the last time he attempted to put a steel plate or graft a bone, in place, where the bone had been removed in fracturing this jaw. But at that time he could not do it. Apparently there was some reason he was unsuccessful and again had to put the wires back in and they are still there.

Q. How long were these wires in your mouth? A. The wires were taken off at that time two days before Christmas of 1958.

37 Q. And they were put on on what date in October? A. October 15.

Q. How about the food? Were you able to eat, Mrs. Brown, in that two-month period of time, two-and-a-half-month period of time? A. No. But I could eat through a straw.

Q. Have you lost any weight, Mrs. Brown? A. Approximately twenty pounds.

Q. Now, how long were you in the hospital the last time? A. Approximately a week or ten days.

Q. When you got home, will you tell us what you did while you were home. A. Well, I had terrible headaches and again the ache in the jaw, and of course every time you relaxed the wires would have that constant pull. There was never a let-up on that. It seemed a constant pull.

Q. Were you able to sleep? A. Not too well.

Q. Were you taking any sleeping medicine? A. The only sleeping medicine I could take were things that were liquid form, and that I would take.

Q. You say Doctor Greenfield was treating you. Will you tell us what he was treating you for.

Q. He was trying to keep my blood up, and keep my weight up.

38 Q. Did you gain any weight back? A. No, I have not.

Q. Since you got back from the hospital the last time, Doctor Dick again operated on you, has he seen you since that time? A. Yes; he did.

Q. And where was this? A. I went to his office, as I have several times between that time and this date, because different little things would occur in my jaw which I thought maybe had something to do with it, like if I had a pain or a lump or something, which I didn't know anything about and I thought he did.

Q. What would he do for you? A. He would look it over and assure me that everything was all right until he could operate again.

Q. Do you know a Doctor Swanson? A. Yes. Dr. John H. Swanson is a prosthodontist.

Q. Were you his patient at any time? A. Yes. After the wires were removed the last time, my teeth were so out of line that I was sent to Doctor Swanson to see if he could line them up in any way.

Q. And what did Doctor Swanson do? A. He tried to grind them and make them more comfortable for me.

39 Q. Did he do anything else? A. He took a plaster cast of both upper and lower teeth.

Q. And did he tell you the purpose of that? A. For future use and future reference if -- when they finished all the operations he would be glad to try to help me with my teeth again.

Q. Now, what is the condition of your jaw at the present time?
A. Well, my jaw is still wired. There are still non-union of bone, and it still aches constantly. I will say that hardly a day goes by that I don't have a pain in one way or another with it. Sometimes it is worse. Sometimes it's not so bad and so forth. But I never forget that it is there.

Q. Do you anticipate going through another operation for that condition, Mrs. Brown? A. I hope to.

Q. And who is going to perform that, do you know? A. Dr. Arthur Dicke.

Q. Now, Mrs. Brown, directing your attention to June 1, 1958, you say you were employed at the Washington Terminal at that time?
A. That is correct.

* * * * *

40 Q. Were you able to resume employment following this occurrence?
A. No, I was not.

Q. That is, not at Washington Terminal? A. That is correct. I could not talk constantly as we had to do down there.

Q. Where did you get a position? A. So I took a position near my house as a bookkeeper, for the Equitable Life Insurance Company.

Q. Are you employed there now? A. Yes, I am.

Q. What were your earnings at first, at the Equitable Life Insurance Company? A. When I first started my salary was fifty-two fifty per week.

Q. And when did you get that job? A. Either the end of January, I believe, 1959, or the first part of February.

Q. And was that the first time you were able to do any work whatsoever? A. That is correct.

Q. Did you later on obtain a raise from the Equitable Life Insurance Company? A. Yes. Periodically, three months, I believe nine
41 months and fifteen months, or something like that, I was given a raise.

Q. How much? A. I think the first raise was two fifty a week.

Q. And how long did you work at that raise two fifty a week until you were again raised? A. I think after I had been with the company for nine months they gave me another raise of about two fifty.

Q. Up to the present time how many raises have you received with the company, if you recall, Mrs. Brown? A. About six.

Q. And what are your present earnings with the Equitable Life Insurance Company? A. Seventy-five fifty per week.

Q. So you have never earned since you went back to work as much as you had been earning at the Washington Terminal, is that correct? A. That is correct.

Q. Did you live in an apartment when this occurrence took place, or was it a house? A. It was an apartment.

Q. And how many rooms in that apartment? A. Three.

Q. And who did the housework prior to this occurrence of July 1st, do you recall? A. I did most of it myself.

42 Q. And after this occurrence were you able to do the housework? A. No, I couldn't do all the housework. I had a maid come in.

Q. Do you recall what Doctor Swanson's bill was? A. I believe it was $40.

Q. And Doctor Dick's bill for the two operations and the time he treated your infected jaw? A. Approximately $600.

Q. What is Dr. Alfred Greenfield's bill? A. Approximately $650.

Q. And do you recall what the Washington Hospital Center bill was? A. Very near a thousand dollars.

Q. Do you know Dr. George Tievsky? A. Yes.

Q. What did he do? A. He is the X-ray man. He X-rayed my teeth, my jaw, many times.

Q. Do you recall what his bill was for services? A. Ninety-five or a hundred dollars.

Q. Were there any other doctors that you saw who treated you for anything whatsoever since this occurred? A. Dr. Harvey Ammerman. He is a neurologist.

43 Q. And what were your complaints when you went to Doctor Ammerman? A. Doctor Ammerman came to me in the hospital after I had been there the first time. A few days, I couldn't see. I would see two people instead of one. And if I would reach for something -- for example like this, I would tip it over. I would reach too far and tip it over. And they realized it was something with the nerves or something, so they called Dr. Harvey Ammerman.

Q. Did he examine you? A. Yes, he did.

Q. Do you know what his bill was for services? A. I think it was only $25.

Q. Do you know a Dr. Sterling Mead? A. Yes, I do. Dentist.

* * * * *

Q. Did you see Doctor Mead? A. Yes. I saw Doctor Mead.

* * * * *

44 Q. Who recommended Doctor Mead to you? A. Dr. Arthur Dick.

Q. Do you know what he treated you for? A. Yes.

Q. Will you state that, please. A. He took care of my jaw while Dr. Arthur Dick took a trip. In this long period of time, he finally went on vacation.

Q. And what were his charges for services, do you recall? A. I believe it was $50.

* * * * *

45 Q. Mrs. Brown, are you going under another operation for your jaw? A. Yes, I am.

Q. Will you tell us when? A. Probably this fall.

* * * * *

CROSS EXAMINATION

BY MR. WELCH:

Q. Mrs. Brown, I understand you first went to Doctor Hurley about 1948; is that correct? A. That is correct.

Q. Was it in 1948 that Doctor Hurley first took X-ray pictures and discussed with you these particular impacted teeth that Doctor Keaveny eventually operated? A. Yes.

Q. What discussion did you have with Doctor Hurley about the impacted teeth at that time in 1948? A. Well, Doctor Hurley first X-rayed
46 my teeth in 1948. As soon as he saw this impacted molar he told me we would have to watch it carefully and that if it ever gave me any trouble or anything that I would have to go to a surgeon dentist.

Q. That is all that was said about it at that time? A. That is correct.

Q. Did you talk about that particular condition of impaction with Doctor Hurley from time to time during the ten years between '48 and '58? A. No. The only thing, every time I would go for a periodical check-up he would check that particular tooth as he did all the others. And if there had been anything wrong he would have told me.

Q. Well, what I am asking you is not whether there was anything wrong in so far as the X-rays were concerned with the area, but did you talk with Doctor Hurley about this impacted tooth condition between '48 and '58? A. No, we did not.

Q. When, then, before you went to Doctor Keaveny was there discussion between you and Doctor Hurley last about this impacted tooth? A. In the spring of 1958.

Q. Would you mean somewhere in May or April? A. That is right. The end of April or the first part of May.

* * * * *

47 Q. And had you gone to Doctor Hurley then particularly with respect to this impacted tooth? A. No, I did not.

Q. You went just as a routine visit? A. That is correct.

Q. And again he took X-ray pictures of the entire mouth, is that it? A. That is correct.

Q. Then what was said in April with respect to this impacted area? A. When he saw the X-ray it indicated something, there had been a change. And he told me at that time I should have that tooth removed before the fall that year.

Q. Did he say what change he observed? A. No, he did not.

Q. Did he say anything else to you about the condition of the impaction and the problem of extraction? A. No, he did not.

Q. He never told you that it would be a very difficult and dangerous extraction? A. No, he did not.

Q. What did he tell you about the services of the physician you should seek for the extraction? A. He told me, I think the first time

48 he ever saw it, that, as I stated, that I should go to a surgeon and have it taken care of.

Q. You remember testifying about this case in my office in April 1960? A. I have never been in your office.

Q. Maybe it was somewhere else. Mr. Mendelsohn's office? A. Yes.

Q. It was located at that time in the Washington Building? A. That is correct.

Q. Referring to page 5 of the deposition of your testimony at that time, the question asked you was:

"Did there come a time when you learned from Doctor Hurley that you had an impacted molar tooth in your lower right jaw?" Did you answer the question this way?

"When I first went to him, the first time he ever X-rayed my teeth, he told me that I had an impacted molar tooth and that no matter where I was I should always go to the best surgeon and

dentists to have it removed. If it ever gave me any trouble, that is."

* * * * *

49 A. Are you asking me if I answered it that way?

THE COURT: That is the question.

THE WITNESS: Yes. That is the way I answered it.

BY MR. WELCH:

Q. Now, did you have any discussion with Doctor Hurley as to the reason that he wanted you to see the best surgeon and dentist if it was necessary to remove this particular tooth? A. No. I didn't ask him, because it wasn't bothering me.

Q. Did I understand you to say that Doctor Hurley himself had from time to time done some tooth extractions for you? A. Yes, he has.

50 Q. When it came April 1958, and he told you that he found some new development in this impacted area, was there any discussion with him then as to whether he should undertake to remove that tooth?
A. No, there was not.

Q. When he discovered that there was something, a change in the area of the impaction, did he show you his X-rays of the impacted tooth?
A. I believe he did.

Q. And did he point out to you the nature of the impaction, just what it consisted of? A. Yes. I was familiar with it.

Q. And did you understand that one tooth was buried in the jaw completely overridden by another tooth? A. Yes, I knew that.

Q. And in order to remove one both would have to be removed?
A. Yes, of course.

Q. Doctor Hurley explained all that to you? A. I knew that. I saw the X-ray.

Q. I want to know whether you knew it from your reading of the X-rays or did Doctor Hurley explain it to you? A. He wouldn't have to explain it to me.

51 THE COURT: Don't argue. Just answer the question. Did he explain it to you?

THE WITNESS: I don't remember. I guess he did.

BY MR. WELCH:

Q. Well now, was there any discussion with Doctor Hurley at that time as to whether he himself would undertake to remove these teeth? A. No, there was not.

Q. Was there any discussion at that time as to whom you should see to have the teeth removed? A. No, there was not.

Q. When was the discussion with respect to where you should go or whom you should consult for the removal of these teeth? A. I believe the day before July 1st, '58, I called his office to ask him whom I should have pull this tooth, because I would have some time off from work at that time.

Q. Well now, you didn't call him to make an appointment to go in his office to have him pull the tooth? A. No.

Q. And exactly what was said by Doctor Hurley when you called him on that occasion? A. Doctor Hurley only referred me to Doctor Keaveny.

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52 Q. After you arrived at Doctor Keaveny's office and found there would be some delay you left the office to go somewhere and get your little boy, didn't you? A. That is correct.

Q. And then came on back to the office? A. That is correct.

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53 Q. What did Doctor Keaveny do first after he came in the room, as you recall? A. He X-rayed my jaw, tooth.

Q. And then after the X-ray was made, did you remain in that room until the X-ray film was returned to Doctor Keaveny? A. Yes, I did.

Q. During that time did you have any conversation with Doctor Keaveny about your case? A. No, I didn't.

Q. Did you have any conversation with him about anything during

that interval of time? A. Do you mean before the X-ray was brought in?

54 Q. Yes; before the X-ray was returned. A. No.

Q. Eventually Doctor Keaveny received the X-ray. Well, now, will you tell me precisely what happened when the X-ray was brought back in to Doctor Keaveny. A. When the X-ray was brought back in Doctor Keaveny held it up to the window and he didn't say anything. And so I asked him if he was going to break my jaw. And I explained to him that I had had a broken jaw previously and I didn't want to go through this pain and agony again. And he stated to me that he would not break my jaw.

Q. Is that all the conversation? A. That is correct.

Q. So that the conversation, the very first conversation you had with Doctor Keaveny was to ask him if he was going to break your jaw? A. That is correct.

Q. You didn't ask him anything about what the X-ray picture showed? A. No.

Q. Didn't ask him anything about whether he had to remove one or two teeth? A. No.

Q. No discussion as to how your mouth felt, whether you had any pain or difficulty? A. None whatsoever.

55 Q. Didn't Doctor Keaveny explain to you what the X-ray picture disclosed? A. No.

Q. Who was in the room at that time that you say you asked Doctor Keaveny if he was going to break your jaw? A. Two nurses.

Q. Both of the nurses were there? A. That is correct.

Q. Isn't it a fact, Mrs. Brown, that Doctor Keaveny explained to you just exactly what the X-ray picture disclosed, and explained to you that it would be a very difficult and dangerous operation? A. No, it is not a fact.

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56 GEORGE G. BROWN,

called as a witness by plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. Will you state your full name, Mr. Brown? A. George G. Brown.

* * * * *

Q. And you are the husband of Mrs. Grace Brown, the plaintiff in this case? A. I am.

Q. Now, Mr. Brown, directing your attention to July 1, 1958, did you accompany your wife to Doctor Keaveny's office? A. I did.

Q. Now, where was Dr. John Keaveny's office at that time? A. It was at Vermont and L; 1029 Vermont and L.

Q. How did you get to his office, Mr. Brown? A. In my car.

Q. Was your son with you at the time? A. He was.

Q. And did you go up to the doctor's office with your wife?

57 A. No, I did not.

Q. And did you have any conversation with Mrs. Brown when you left her there? A. Yes. When we pulled up in front it was ten o'clock. She had a ten o'clock appointment and she told me, would she make the appointment, she said she would approximately be forty-five minutes.

Q. Where did you go after that, sir? A. I let her out at ten o'clock and my son and myself, I told her we would wait for her. We went across the street and had breakfast and came back at quarter of eleven.

Q. Where did you go at quarter of eleven? A. D. C. Diner's on the corner. We had breakfast and we came back at quarter of eleven and she hadn't came down yet.

Q. Then what did you do? A. I waited a few minutes and she came out of the building. She came over to the car and said that Doctor Keaveny, they hadn't taken her yet, that the office -- he was running

behind time, and that they hadn't taken her yet. So then I told her that I had to go to work, and I was going to take the kid home and she said no, leave him here with me and I will take him home when I go.

Q. Now, did your wife then take the boy back to the doctor's office? A. She went back upstairs to the dentist's office.

58 Q. When was the next time you saw your wife? A. It was about three, three-fifteen that afternoon.

Q. And where was this? A. Doctor Keaveny's office.

Q. Did you get a phone call to come to Doctor Keaveny's office? A. No. When I let my wife out of the car I told her to call me at work and let me know how she made out. When three o'clock came I hadn't heard from her so then I called Doctor Keaveny's office and Doctor Keaveny got on the phone and he said, "Mr. Brown." I said yes. He said, "Would you come down here. I want to talk to you." So then I left and I went to Doctor Keaveny's office.

Q. Did you talk to Doctor Keaveny when you came to his office? Was he the first one you saw? A. No. The first one I saw was my son, which was sitting in the waiting room.

Q. And did you have any conversation with anybody up in Doctor Keaveny's office right there? A. No. When I walked into the office my son was sitting in the waiting room and there was no one at the desk. So I said to him, I said where is my wife -- you know, his mother. He said something has happened to her. So I didn't see anybody around so I went on back into the office in the back.

59 Q. Who was back there? A. Doctor Keaveny, when I walked into the back of the room, where his offices are, he came out and said "Mr. Brown." I said yes. And he said, "Well, something has happened to your wife." So I said, "What?" And he told me, he said, "Well, I have broken her jaw."

Q. What did you do then? A. I asked him, I said, "Where is she?" He said, "She is back in this room back here."

Q. Did you go back in the other room? A. I went back into a little room that was in the back of his offices.

Q. What was in that room? A. There was one window to the left, and like a cot there, and then it was a very small room. And the nurses were in there.

Q. Did you see your wife? A. A. She was lying on a bed -- rather, on the cot you might call it, and she was unconscious. And I looked at here and she had blood on the front of her blouse and on her mouth, and I said to Doctor Keaveny, I said, "What is wrong?" He said, "Well, I think she has got a fractured jaw." So then I said to him, "Have you called the doctor?" and he said no.

Q. Did he tell you why he hadn't called the doctor up to that time? A. No, he did not.

60 Q. What did you do? A. Well, I said to him, "Well, then," I said, "I am going to call the doctor." So then --

Q. Did you call the doctor? A. I went to leave to call the doctor, and then he said to me, he says, "Well, before she leaves here I want to X-ray her jaw again." So I said all right. So then he says, "Well, let's take her back into where to X-ray her face," and he says, "I will X-ray it before she leaves here."

Q. When you said you called the doctor, what did you call the doctor for? A. Well, I didn't call him right at that minute. At that minute Doctor Keaveny or one of the nurses asked me to help her up, pick her up and help to get her into the dentist's chair so they could X-ray her face. So I picked her up and the other nurse helped me and we took her into the dentist chair where they X-ray teeth, I presume, and they sat her in the chair and one of the nurses put her head back and she was still unconscious and sort of white looking color to her. She had turned white, and the nurse swung the machine around and the cone on the machine struck up side of the face.

Q. Struck her? A. My wife up side of the face and she let out a

61 scream and Doctor Keaveny said, Watch it. They went on and took the pictures. I went out in the other room and waited. The two nurses brought her out and put her back on the cot. I said to Doctor

Keaveny, I am going to get out and get a doctor. Doctor Greenfield is down on the first floor, which is her M. D., in the same building. He didn't say anything more to me. He went on into the office and I heard him dial the phone and asked for Doctor Hurley. When he got Doctor Hurley, he said something happened to Mrs. Brown. He seen me standing there and he closed the door. I went on out and I got on the elevator and went to Doctor Greenfield's office.

Q. Where is Doctor Greenfield's office? A. On the first floor.

Q. Was he in his office at that time? A. He was coming out of his office, closing visiting hours for the day, and I caught him just as he came out of the door.

Q. What did you and Doctor Greenfield do? A. I told him what had happened and he said, well, where is she? I said she is upstairs. We got on the elevator and went back upstairs.

Q. What time was this? A. That was approximately quarter of four.

Q. Go ahead, Mr. Brown. A. So when we got back upstairs
62 Doctor Greenfield had I take him in to where she was, and he looked at her and so forth and so on. He said she has got to go to the hospital right away.

Q. Did Doctor Keaveny at any time go down to Doctor Greenfield's office with you? A. No, he did not.

Q. How did you get your wife to the hospital?

* * * * *

THE WITNESS: In my automobile.

BY MR. MENDELSOHN:

Q. Did she walk out herself, by herself? A. The nurse and myself carried her out.

Q. And what hospital did you take your wife to? A. Washington Hospital Center.

* * * * *

Q. When you got to the Washington Hospital Center what was the condition of your wife at that time? A. She was unconscious. I picked her up out of the car and I took her into the hospital, and they seen it was an emergency case so they took her right on upstairs and when they got her upstairs she was white, and she had turned white.

63 As I said, she was unconscious, and they started piling blankets on her.

Q. Did Doctor Keaveny accompany you to the hospital?

* * * * *

A. No.

Q. How long did you stay with Mrs. Brown at the hospital?

A. Approximately an hour, an hour and a half.

Q. And was Doctor Dick there at that time? A. No.

Q. When did you return to the hospital to see your wife?

A. Later on that evening.

Q. And was she conscious at that time? A. No.

Q. How long did you stay there? A. I stayed there until approximately nine o'clock.

Q. When you left the hospital did you have any conversation with your wife in the hospital room whatsoever? A. No.

Q. When did you again return to the hospital? A. The following

64 morning.

Q. And were you able to converse with your wife at that time?

A. No.

Q. What was her condition? A. They doped her up. She didn't recognize anybody. She was under sedative.

Q. How long did you stay at the hospital that day? A. I stayed there about two hours.

Q. Was she under the care of any particular physician at that time? A. No.

Q. When did you see her again? A. That afternoon I went back again.

Q. Now, did there come a time when Doctor Dick visited your wife at the hospital? A. Doctor Dick came that night, that I took her to the hospital, but I didn't see him because he came very late, I understand.

Q. Did you call Doctor Dick? A. Doctor Greenfield called Doctor Dick.

Q. Did you have any conversation with Doctor Dick in a day or so following the entry of your wife to the hospital? A. No. The only time I talked to Doctor Dick was after he operated on her jaw.

* * * * *

69 CROSS EXAMINATION

BY MR. WELCH:

Q. Mr. Brown, didn't Doctor Keaveny tell you when you came in the office that he was waiting to hear from Doctor Dick? A. No, he did not.

Q. Didn't he tell you that he had called Doctor Dick? A. No, he did not.

Q. Who told you that Doctor Greenfield called Doctor Dick? A. Doctor Greenfield told me himself.

Q. Who told you that? A. When I was in the office Doctor Greenfield picked the phone up called Doctor Dick.

Q. What office? A. Doctor Keaveny's office.

Q. Did you come into Doctor Keaveny's office with Doctor Greenfield?

70 * * * * *

A. That is right.

Q. Did you hear Doctor Keaveny tell Doctor Greenfield that he was waiting to hear from Doctor Dick? A. No.

Q. You know who made the arrangements for Mrs. Brown to go to the hospital? A. Doctor Greenfield.

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72 DR. JOHN F. KEAVENY,

called as a witness by the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. State your full name, Doctor. A. John Francis Keaveny.

Q. You are a practicing dentist in the District of Columbia? A. Yes, I am.

Q. And you specialize in any particular branch of dentistry?

73 A. In the field of oral surgery.

* * * * *

Q. Now, how long have you been specializing? A. Between my training period, any my active practice, since the fall of 1930.

Q. So you have been practicing dentistry for thirty-six years, is that correct, Doctor? A. That is correct, Mr. Mendelsohn.

Q. Now, do you know Mrs. Brown, Grace Brown? A. Yes, I have met her as a patient. She was then Mrs. Fisher. Miss Margaret Fisher.

Q. And when was that that you saw her for the first time?

74 * * * * *

A. I believe it was on July 1st of that year.

Q. 1958? A. Fifty-eight, yes.

Q. And did she come to your office that morning? A. Yes, she did.

Q. And will you tell us what conversation you had with Mrs. Brown, if any, that morning? A. Well, it was some time before I got to see Mrs. Brown that morning, because I had a number of other patients that took more time than I had contemplated. And it must have been somewheres in the neighborhood of eleven o'clock, although she had arrived in the morning at ten o'clock. When she had been admitted to the office, that is, the inner part of the office, by one of my nurses, I met her in one of the operating rooms. And after she had seated, or

been seated there, I said, "Hello, Mrs. Fisher, how are you today?" And I asked her if she had a problem, if she was going to have some teeth removed, and she said yes, I was. Or am. She said that she had been sent to me by Doctor Hurley for the removal of an impacted tooth.

Q. Do you know Doctor Hurley? A. Yes, I do.

* * * * *

75 Q. Now, tell us what you did next, Doctor, after you met Mrs. Brown, greeted her. A. Well, Mrs. Brown told me that she had come to my office for the removal of this impacted tooth. And I told her that I had talked to Doctor Hurley, and that he told me in a broad way the nature of the problem, and that he was sure that I had a very difficult problem on my hands.

Q. Who told you this? A. Doctor Hurley.

Q. When did he call you? A. Well, I called him.

Q. Was that in the presence of Mrs. Brown? A. Well, she was in the office. We had several phones. And I think I probably repaired to my own private office to call the doctor.

Q. Had you spoken to Doctor Hurley the day before? A. I don't believe that I did, although my memory perhaps is a little hazy on that point, but I know that I talked to Doctor Hurley before I worked on Mrs. Fisher.

Q. Did you take X-rays? A. Yes, I did.

76 Q. Of the mouth of Mrs. Brown? A. Not of the entire mouth. I confined my X-ray examination to the area where the problem lay.

Q. And did you develop those pictures? A. Oh, yes. Yes, I did.

Q. Did you show those pictures to Mrs. Brown? A. I brought the pictures, or the pictures were brought to me in the operating room where Mrs. Brown was present. And I looked at the pictures for the purpose of studying the X-rays, to determine what the problem was in the removal of the offending tooth. I think that Mrs. Brown did look up at the X-rays and said, "Well, let me look at that," which is very

common amongst patients, and which we of course are glad to do. And we will be glad, and have always been glad to make any explanatory effort that we can.

Q. Doctor, while Mrs. Brown was sitting in the chair there, and you were taking these pictures, did you observe her as to what kind of a person she was? Nervous, and so? A. Yes, I did, sir.

Q. Was she calm, nervous? A. No, she wasn't calm.

Q. She was nervous, was she? A. Yes.

Q. Would you say very nervous? A. I think she was more nervous than the average patient who comes in, most of whom do exhibit

77 a degree of nervousness at the prospect of having work of that nature done.

Q. When you took these X-ryas, and looked at them to see what problem you had, did Mrs. Brown then discuss the pulling of her tooth with you? A. Only in so much as she asked questions as I presented the problem to her.

Q. Did she tell you, Doctor, at that time: Doctor Keaveny, are you going to break my jaw? A. I don't recollect that she said that, in that manner.

Q. She did mention something? A. I did tell her, I did tell her that because of the nature and the location of the impacted tooth, because of the thinness of the bone --

Q. Wait a minute, Doctor, please, before you get to that.
A. I am sorry.

Q. Did she state to that that, Doctor: Are you going to break my jaw? Will you kindly answer that question yes or no. A. She may have. She may have, sir.

Q. And what was your answer to that question, Doctor? A. Well, I said, "No; I will endeavor not to break your jaw. Although you have

78 a very difficult problem here. And there is always a possibility of a fracture of the jaw in a case of this sort."

Q. Now, who was present, if anybody, when you told her that?
A. I think both of the nurses, Mrs. McMullin and Mrs. McCormack, were present at that time.

Q. Are these nurses working for you at the present time? A. No, they are not.

Q. Now, Doctor, when you told Mrs. Brown that there was a possibility of breaking her jaw, why did you say that? A. Because I feel now, and have always felt --

Q. What did you feel then, Doctor, at that time? A. That wherever there is that possibility, I feel obligated to inform the patient of that possibility.

Q. Did you have Mrs. Brown sign any instrument? A. No, I did not.

Q. Don't you usually have your patients sign an instrument when they are going under an anesthesia, Doctor? A. Well, we do now.

Q. That is, after this occurrence, is that right? A. No, no, not after this occurrence.

Q. What do you mean by you do now? A. That has only in late years become the common practice amongst men who are doing this work.

79 Q. Doctor, aren't there times, when you feel that you have a difficult case, that you have your patient sign this instrument? A. Well, that is a good procedure.

Q. You have done that, Doctor? A. I have done it, yes.

Q. When the cases you thought were severe, they may break a jaw, that you have these people sign an instrument; isn't that correct? A. Not always.

Q. Not always, but you have done it? A. Oh, I have done it on some occasions, yes.

Q. Doctor, can you tell us approximately how many impacted teeth you have extracted in your long experience of practice as a dentist? A. Well, I certainly would not want to be held to any statement in that direction. We have approximately records of handling somewheres between fifty and sixty thousand patients, over my years of practice. Just what the percentage of impactions are in those patients, I don't know. But we have handled many impactions.

Q. Doctor, would you say you extract a couple of hundred of impacted teeth a year, or more than that? A. I think that depends on circumstances. I am sure it happens in your practice of law. You get certain types of cases running in cycles and we get some.

80 Q. Well, as far as you can remember, Doctor. A. I wouldn't want to be held to that figure; although we have quite a number.

Q. In your 36 years of experience, Doctor, will you say that you have extracted around perhaps three, or five thousand impacted teeth? A. I wouldn't have any way of knowing. I have never made any statistical study of it, or compilation, so that anything that I would say as the exact number would be purely a guess.

Q. Doctor, in your practice, have you ever, before this occasion, fractured a patient's jaw in pulling an impacted tooth? A. Yes, sir, I have.

Q. How many times, do you recall? A. Oh, I guess two or three times.

Q. And will you tell us on those occasions how this happened? A. Well, I recall one case that I removed a third molar from a woman's jaw, whose was just partially impacted, was moreof the nature of a tissue impaction. And I put an instrument in and just gave a turn and the jaw was broken. There are other factors besides instrumentation which are responsible for fractured jaws.

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81 Q. Doctor, while you were in the operating room and Mrs. Brown made that statement to you, "Doctor, are you going to break my jaw?" can you tell us who was present at that time? A. Well, I told you a few minutes ago, that my two nurses were there, Mrs. McMullin and Mrs. McCormack.

Q. Were they standing right by Mrs. Brown at the time? A. Well, it's a rather small room. The exact location of them, I don't know. One must have been to her left, and the probability is that the other one was to her back. Although that may not have actually been the real location, the exact location. But they were present.

Q. Doctor, you stated that on unusual cases, hard cases, you do have your patients sign an instrument before you operate on them and give them this anesthesia; is that correct? A. Would you repeat that, please?

Q. That you do on unusual cases? A. No, I didn't say that I do. I said that sometimes I do. And perhaps I am doing it more as the

82 time goes on.

Q. Do you think that Mrs. Brown's case was an unusual one at that time? A. I most certainly do.

Q. You did? A. Yes, sir.

Q. Tell us why. A. It is one of the most difficult impactions that I have ever seen.

Q. It was? A. Yes, sir.

Q. Can you tell us why you thought it was so difficult? A. Well, in the first place, the impacted tooth was lying horizontally, or almost horizontally, in the body of the bone. And it was located beneath a second molar tooth. The impacted tooth was the first molar -- the impacted was the second molar, and the first molar was over the top. So that before you could make any approach you had to remove the first molar. In our course of conversation I pointed out the necessity for removing that first molar in order to make any approach at all to the impacted tooth. That in itself is one of the problems.

The second problem, of course, is the relationship of the tooth to the surface of the bone, whether it's on the mouth side or whether it is on the tongue side, or whether it is on the cheek side, or whether

83 it's on the under side, the lower quarter of the bone. Any one of those locations may complicate the removal of the tooth.

Q. Doctor, you knew this after you looked at the X-rays, did you not? A. Certainly.

Q. And came to that conclusion? A. We make a thorough study of any extraction that is brought into our office. Otherwise we would not know how to proceed.

Q. Did you explain this to Mrs. Brown? A. I didn't explain it to her as I am explaining to you, because she didn't ask me these questions and I didn't think actually, from a technical standpoint, that if I did explain them to her that she would thoroughly understand. I did say that the impacted tooth lay beneath another tooth, another molar, the first molar; that before we could have any hope of making an approach to that lower molar we would have to remove the tooth that appears erupted normally and was standing up over that tooth.

Q. And did you tell her at that time, Doctor, that there was a possibility of breaking her jaw in removing that tooth? A. I certainly did. We always do that.

Q. She was apprehensive at that time, wasn't she, Doctor, con-
84 cerning the breaking of her jaw? A. Well, I would think she would be. I would think anybody would be apprehensive about that possibility.

Q. More so in this case because she had mentioned before you had worked on her, isn't that right, Doctor, about her jaw being broken?

* * * * *

A. I will say yes, she did.

* * * * *

Q. Doctor, she told you, did she not, that she had had a broken jaw perhaps about a year before this on the other side of her mouth?
A. She said she had had a broken jaw on the other side.

Q. Will you tell us, Doctor, how you extracted an impacted tooth?
A. You mean as to my approach?

Q. The way you did it.

* * * * *

85 A. First of all, we determine whether or not she was suitable for a general anesthetic. We do that by asking certain key questions which give us a tip-off as to whether it is necessary to proceed further with a physical examination of that patient.

Q. Did you ask her those questions, Doctor? A. Yes, I did.

Q. What did you ask her? A. I asked her if she was being attended by a physician, and she said no, she wasn't, apparently, being attended by a physician. I said, have you ever had any severe illnesses? And she said no, I haven't. I said, Have you ever had any heart disturbance, do you have any difficulty walking up the steps, or any difficulty breathing? She said no, she hadn't. And the examination of her mouth there was nothing that indicated that she had any neurological disease processes, which may present a difficulty in the use of a general anesthetic.

Q. Did you make any kind of a test, Doctor? A. No, I didn't make any kind of a test.

Q. Did you ask her whether she had at any time been allergic to sodium pentothal? A. No, I did not.

Q. Doctor, then, just tell us how you proceeded to extract that tooth. A. Well, when she had been satisfactoruly anesthetized, I first

86 made an incision in the soft tissue covering over the bone.

* * * * *

A. The incision is around the tooth so that we free attachments of a soft tissue to the tooth. That makes the extraction of the tooth more easily. When we had removed the first molar, then we made a longitudinal incision from the area of the extraction forward in the mouth, on the top side of the bone, but more to the tongue side. After having made the incision, with the appropriate instrument, we removed that soft tissue and lifted away from the bone, so that we can have access and exposure and visibility of the bone itself. When we do that, we determine, not only from the previous examination which we have made on the X-ray, but also from the condition of the bone, and the amount of bone that is overlying the tooth, we have already approximated the location of the tooth, and then we start by using a chisel to cut that bone. And we continue to cut it until we see a portion of the underlying tooth. Then we enlarge that area, exposing as much of the tooth as is necessary so that the tooth can be removed from its position. There has to be an opening large enough to permit the tooth to come

out of. So that that is the prime purpose of using -- of removing the bone. When we think we have had enough removal of the strategic bone, then we use other instruments, like an elevator.

87 Q. Doctor, before we get into that, did you use a hammer and chisel on Mrs. Brown? A. Oh, yes, sir.

Q. Mrs. Brown's tooth? A. Yes, sir.

Q. Did you do that before you used the elevator? A. Yes, sir.

Q. And tell us how you operate with a chisel and hammer, please. A. It's the same as any other chisel, except that it is the size that is convenient for use in the mouth. I hold the chisel with one hand and then I have a mallet in my other hand. The mallet is designed with proper weight for use in the mouth.

Q. How much did this particular mallet weigh, Doctor? A. I don't know.

Q. So you strike this chisel with this mallet? A. Yes, I do.

Q. Tell us what it did to the tooth when you struck this chisel with the mallet. A. Well, I pointed out to begin with, maybe I didn't make myself clear, that we use the mallet and chisel to remove the obstructing bone so that we can see or have access of the tooth which we wish to remove. We don't ordinarily -- that is, unless there is some special reason for it -- we don't ordinarily use a chisel on the tooth.

88 Q. Where do you use the chisel? A. Where do we use it?

Q. You said you don't ordinarily use it on the tooth.

THE COURT: The witness said he used it on the bone. He said that twice.

BY MR. MENDELSOHN:

Q. Doctor, how many times do you recall you struck that chisel with the mallet? A. You mean in this case?

Q. In this case. A. I don't know.

Q. Did you break any of the tooth or jaw bone with the chisel? A. If you are cutting bone, it's jaw bone that you are cutting.

Q. Doctor, at any time that you used this mallet on this chisel, is it possible that you struck that chisel too hard and that it would fracture the jaw bone? A. Well, I think if you used a great deal of force, but I think a man who has experience will adjust the amount of force to meet the situation.

Q. Is it possible, Doctor, you could have used this force and broken her jaw without knowing about it at that time. A. That is very
89 remote. I don't see how it could happen; if you did it with a chisel, or if you did it with a chisel at all. And the reason for that is, you have a sense of feel in your fingers, and your hand, and that chisel as you are striking it. And you can tell from the weight of the blow and the resistance that is offered by the bone whether you are breaking it or not. And most certainly if we were cutting bone, as we did in this case, on the top surface of the bone covering that tooth, there would be no possibility of breaking that bone because you have the bone not only on the top surface, but you have it on the inside surface or lining surface, you have it on the cheek surface, and the greatest amount of bone is on the under surface, so that we are just working in a small area. And the possibility of fracturing that jaw with that chisel in that instance is extremely remote.

Q. You say it is not usual or it isn't unusual an occasion when a jaw bone is broken by a force used by the mallet onthe chisel, Doctor? A. Yes, sir, I would say that is unusual.

Q. You have known of cases, haven't you, Doctor? A. No, I don't.

Q. Where this has happened? A. No, I don't.

Q. Continue, Doctor. Continue what you did. A. Once the tooth
90 had been uncovered, so that we could get a position with the working point of our elevator, we attempted to put that elevator into position, so that we could get some leverage and move the tooth. We never attempt to take the tooth out first. We first try to get the feel of the amount of resistance that is present, so that we can minimize and reduce the possibility of any untoward event. So that our first

effort is to place the instrument in position, to find out how much movement we can give that tooth, without breaking down a lot of bone. If we cannot move the tooth, then we know that there are two situations which obtain. One of them is that there is too much bone impeding the eruption of that tooth, and that more bone needs to be removed, or, if the resistance -- if we have determined that we have removed apparently enough bone, then we conclude from our former experience that either the shape of the roots or the direction of the roots, or the density of the bone, or there having been a previous infection present, there has been set up a union between the tooth and the bone, so that the only way, in that case, is to cut the tooth. Now, in this case I found that there was resistance. And I determined that I very likely could not get that tooth out without cutting the tooth. There is no objection to cutting the tooth. And in many instances it is preferable to cut the tooth. By cutting the tooth we minimize and obviate any further disruption of the bone. And that is exactly what I did in this case. I started to

91 cut the tooth. Now in cutting the tooth which is firmly fixed in the bone, you don't get the type of yield that you would get when you strike your chisel against bone. So that you get a lot of resistance. In order to minimize resistance, and keeping in mind the fact that we have a possibility of a fixation of that root or that tooth with the bone, we start to drill holes in the tooth itself. We put these holes in a line, and then we connect these holes by driving a chisel through them. The only damage is done is done to the tooth itself. That permits you to break the tooth and to get the tooth out in part. A procedure which is many times resorted to.

Q. Doctor, was this tooth decayed? A. Yes, it was decayed.

Q. When did you find that out, Doctor? A. On July 1st.

Q. When you looked at the X-rays or by your operation?
A. I think we found that out when we saw the X-ray.

Q. Doctor, do you recall coming to my office with your attorney, Mr. Welch? A. Yes, I do, Mr. Mendelsohn.

Q. And your deposition was taken? A. Yes, sir.

Q. And you were under oath at that time? A. Yes, sir.

92 Q. And you were asked this question.

MR. WELCH: What page?

MR. MENDELSOHN: Page 28.

Q. (Reading) "This tooth of Mrs. Brown's, this impacted tooth, was that decayed; do you know?

"Answer: No, I don't think there was much decay on that tooth at all.

"Question: Could you tell by looking at the X-rays whether it was a decayed tooth?

"Answer: I don't think so, and the reason I say that is that where you have two teeth so close together on the X-ray, you will get the superimposition of one tooth over the other and the one tooth may cloud out any evidence that may be present in another tooth, so it is not unusual for an X-ray to fail to disclose something that later is discovered.

"Question: When you got down to the impacted tooth of Mrs. Brown's, did you notice whether it was a decayed tooth?

"Answer: I couldn't really tell, because you are working down in a hole and you only have a small portion of the tooth to look at."

A. That is correct. I said that too. And I still say here, I believe is the truth too. I said there there was not much decay. The type of

93 decay that I was referring to was the type you ordinarily see in the mouth, where there is a large definite area of decay. It is a fair assumption that despite the fact that you have technical difficulties in seeing the tooth in its entirely, there might well have been some decay. There was obviously a communication between the mouth down alongside of the tooth itself. In the opinion of Doctor Hurley, he felt that there had been some change in the bone, which he was suspicious of a beginning bone infection. So that there might well have been some

decay. And furthermore, in answer to your question about whether you saw decay in the tooth as we are working on it, we have got a little hole and you might very easily have destroyed any evidence of the presence of decay by cutting the tooth.

Q. Doctor, when you answered this question on your deposition, you said "I couldn't really tell, because you are working down in a hole." So you didn't know at that time whether there was any decay or not; is that right, sir? A. I didn't know at that time because I couldn't see at that time.

Q. Doctor, if this tooth was decayed, would it be easier to pull out than if it was a solid tooth? A. Well, I don't think it is a question -- Let me answer your question first, and if I may, I will explain.

Q. This tooth was a decay to this impacted tooth, would it be easier
94 to pull out than if it was a solid tooth against the jaw with no decay? A. Possibly. In some instances it might. In others, it might not.

Q. This tooth, was it hard to pull out? A. It was very, very difficult to pull out.

Q. So we can say then, Doctor, that this tooth didn't have any decay in it? A. Not because of that conclusion.

Q. Did you use any drills, Doctor, to get this tooth out? A. Yes, I did.

Q. How long did it take you to finally extract this tooth? A. Oh, I would -- I don't know that we timed it, but somewheres between forty-five minutes and an hour. We don't check the time of these cases.

Q. Well -- A. We would know from the amount of difficulty.

Q. Could it have been more than an hour, Doctor? A. It might very well have been.

Q. Could it have been as long as an hour and a half? A. I can't --

Q. I am talking about this particular case. A. I can't recall.

95 Q. Could it have been less than an hour? A. It could have been.

Q. Did Mrs. Brown come to at any time during this? A. Yes. When we were at the end of our work, she began to revive. And that was the time that I thought she was all finished.

THE COURT: That she was what?

THE WITNESS: I thought the work was completed.

BY MR. MENDELSOHN:

Q. Was she given another shot at that time? A. I don't believe that she was given any more sodium pentothal at that time.

Q. What was she given -- A. Although she may have been.

Q. If not sodium pentothal what would you give her? A. We might give her some nitrous oxide and oxygen. We are a little hesitant about sodium pentothal because there is a cumulative effect which may be harmful to the patient.

Q. Now, Doctor, when you extracted that tooth, did you leave the chair to go to another office? A. No, I did not, sir.

Q. At what part of your operation was Mrs. Brown's jaw broken? A. Well, I don't know. When I had finished I made a remark to Mrs. McMullin, who was at the head of the patient, keeping a check on the

96 anesthetical level of the patient, I sighed a relief and said, "Gee, we got that out there without breaking that jaw." Then I just turned, to a washstand, which was just directly in front and to the right of the chair, to wash my hands, to get rid of the blood which was on the hands.

Q. Did you know at that time, Doctor, that her jaw was broken? A. No, I didn't, sir.

Q. Well, then, Doctor, could it have been hitting this chisel with this mallet? A. No, I don't believe that it did.

Q. Could it have been lifting her jaw up with this lever too hard? A. You don't get leverage in that fashion. And we don't lift the jaw in that fashion where you might get leverage on it.

Q. What broke her jaw, Doctor? A. We don't know. I am of the opinion that there must have been a muscle contraction and that muscle contraction broke the jaw. Just the same as a baseball player will break his arm, throwing the ball. You get that muscle contraction and it contracts so hard.

Q. Doctor, you were working on the tooth all the time, were you not? A. Yes, I was.

97 Q. Did you see any muscle contraction while you were working on Mrs. Brown's mouth? A. No. No, I did not.

Q. Well, in a muscle contraction does a person have like a convulsive feeling and raise up, raise her jaw? A. Not necessarily. I would be distrubed if a patient did have some evidence of convulsion, because I wouldn't think about the jaw. I would be concerned about other conditions.

Q. Is it your testimony then, Doctor, that the patient, Mrs. Brown, had this convulsive seizure and you didn't know about it -- couldn't know about it? A. It's possible.

Q. What was Mrs. McMullin doing all this time? A. Mrs. McMullin's part, in that operation, was keeping the head of the patient in the proper position, not only so that we would have good access, but at the same time maintaining an opening, airway, so there would be no interference with respiration.

Q. Doctor, in her actions in doing this, would she have her hands on Mrs. Brown's face? A. She would have her hands back here, at the angle of the jaw.

Q. She would have her fingers where? A. Back on the angle of

98 of the jaw.

Q. And what is that purpose for? A. Just to lift the tissues of the back of the tongue so that the breathing space remains open.

Q. And while she would have her hands as you have just stated, you would be working of course on Mrs. Brown's tooth; is that right, sir? A. That is correct.

Q. And would she have her hands in that position for the whole length of the operation? A. Well, no. It is impossible for anybody to keep that position for any great length of time. You get relaxation. They have to relax their hands.

Q. But then she would go back to it? A. Yes; she would. If she felt there was a need for elevating, she would. They don't keep con-

tinuous pressure on it. They only put the pressure on when they feel that there is some change in the quality of the breathing of the patient. You know the most important thing with a patient is to maintain that breathing in good, full analgesia.

Q. Doctor, will you show me again, please, where she held her two fingers. A. Right here.

Q. Where were the other fingers? A. In the same position, right this side.

99 Q. Thank you.

Was that Mrs. McMullin? A. Yes, sir.

Q. What was the other lady's name? A. Mrs. McCormack.

Q. What was she doing? A. She was assisting, on the other side of the chair. Her business was to provide light and to evacuate from the mouth any excessive blood or any excessive saliva or any foreign material that might interfere with the surgical procedure and at the same time might create a possibility of a patient swallowing that.

Q. She was working then with an aspirator? A. Yes, sir.

Q. Right over Mrs. Brown's open mouth? A. On the other side, yes, sir.

Q. And was she there the whole length of the operation? A. Always there while we are working with the patients.

Q. Doctor, can you tell us how many pieces were taken out of the jaw? A. No, I couldn't tell you.

Q. Were there numerous pieces taken out? A. I would say there were multiple pieces.

Q. Would you say that they were shattered? A. Well, no, I don't think that they were shattered. They were just broken off, or cut off.

100 Q. And how would you get them, out, Doctor? A. From what place? What position?

Q. From the place where you were pulling her tooth. How would you get these shattered pieces out? A. Well, we get that from the tooth itself. Once we have weakened that portion of the tooth which

we wish to get out, then we deliberately remove that portion from the tooth. So that we remove the tooth in effect piece-meal.

Q. Now, did you take X-rays again? A. Yes, we took a picture.

Q. Did you take the X-ryas? A. Yes, I took a picture.

Q. That was after Mr. Brown got there? A. No, I didn't take any after Mr. Brown got there.

Q. You took no X-rays while Mr. Brown was there; is that correct? A. No. We had already taken pictures.

Q. When did you take the pictures following the time you learned of the fractured jaw? A. I didn't say we took picture. Repeat that again.

Q. Did you take X-rays of her mouth again, I asked you.
A. I took a picture right after we determined that there was a fracture.

Q. And that was when Mr. Brown was there, wasn't it?

101 A. No. It was not when Mr. Brown was there.

Q. How soon after you learned of a fractured jaw did you take the second X-rays? A. I knew right away.

Q. Beg pardon? A. Mrs. McMullin called it to my attention. She said, "I think there is something wrong here." And I was washing my hands in that same room and I turned around and immediately went to the patient.

Q. So it was Mrs. McMullin -- A. And one of the signs --

Q. Pardon me, Doctor. It was Mrs. McMullin that discovered your patient had a fractured jaw before you did, is that right?
A. No, I wouldn't say that.

Q. Didn't you say -- A. She was suspicious that something was wrong; that the movement in the bone was more than normally is present.

Q. Did she tell you, Doctor, that I think you fractured Mrs. Brown's jaw? A. She didn't say "I think you have fractured the jaw." Because nobody is sure --

THE COURT: Just answer the questions, Doctor.

BY MR. MENDELSOHN:

Q. What did you do after Mrs. McMullin said there is something

wrong here? A. I looked at it and examined it myself.

102 Q. What did you do? A. I felt the jaw. I felt the portions of the bone, and I saw that there was abnormal mobility in that area. And then I took an X-ray. And that confirmed my suspicion.

Q. What did your X-ray picture show then? A. It showed that there was a fracture in the body.

Q. Was that right at the tooth you had pulled? A. Right in the area, yes.

Q. How far from the exact area of this particular tooth was it? A. It was right in the immediate vicinity.

Q. Was the fracture of the jaw bone right under the impacted tooth that you were working on? A. Well, it went right through the body of the bone.

Q. Right straight through there? A. It went right through the body of the bone. Otherwise you wouldn't have a fractured jaw. There has to be a continuity of that bone, otherwise you don't have a fracture.

Q. What did you do next? A. Well, I began then to attempt to clear up the area, to see if I couldn't wire the jaw. And I stopped doing that because Mrs. Fisher became a very overactive patient in the chair. She was losing anesthetic rapidly and she was beginning to recover from

103 the effect. So then I realized, thought the thing over, and I said that this jaw probably, because of the nature of the jaw, would probably need an open reduction; and that it was a problem of making an excision through the external skin. So I said to one of --

Q. Wait a minute, will you please, Doctor. We will get to that.

Doctor, when you found out that Mrs. Brown's jaw was broken, did you call a medical physician in to see her? A. I called Doctor Dick's.

Q. Where is his office? A. Well, he was then on Massachusetts Avenue.

Q. Did you immediately call him when you found out her jaw was broken? A. I don't know whether it was immediately, but it was very quickly afterwards.

Q. How soon, would you say? A. Oh, within five or ten minutes I started to try to get hold of Doctor Dick.

Q. Doctor, in this medical building you are in over there, there are many medical doctors in that building? A. At that time there were not.

Q. You mean in that area, do you mean? A. Yes. Men were beginning to move out of that building, or had been moving for quite some time, into other areas.

104 Q. There were several doctors in that building, weren't there? A. Well, only one that I recall, Doctor Greenfield.

Q. He was on the first floor? A. And there was another man who was sick and really hadn't spent a great deal of time in his office. I felt that this was a special problem. And I thought Arthur Dick would handle the job very well, so that there would be no cosmetic defects as far as the patient was concerned.

Q. Doctor, you thought this was a special problem. Did you mean that you thought she was in pretty bad shape as far as her jaw was concerned? A. As far as her restoration was concerned, yes.

Q. As far as her broken jaw was concerned? A. No. Don't confuse me. When I say it was a special problem, there was a problem of opening on the outside, and I think that that is a problem --

THE COURT: Go ahead and finish your answer.

A. (Continuing) I think that that is a problem which is never taken lightly with a woman. The possiblity of scar formation afterward certainly requires very considerable consideration and discussion before you do that.

* * * * *

105 Washington, D. C.,
September 26, 1962.

* * * * *

106 BY MR. MENDELSOHN:

Q. Doctor Keaveny, in addition to Doctor Greenfield, you know Doctor Mandelos, do you not? A. Yes, I do.

Q. And Doctor Mandelos is a medical doctor? A. Yes, he is.

107 MR. WELCH: If the Court please, I object to this further examination on this basis. There is nothing in the complaint, there is nothing in the pretrial order upon which there can be predicated any validity to this area of investigation.

MR. MENDELSOHN: It goes to the credibility, Your Honor.

MR. WELCH: I don't think it would affect credibility at all.

THE COURT: I will sustain the objection.

MR. WELCH: Thank you, sir.

BY MR. MENDELSOHN:

Q. Now, Doctor, you stated yesterday that in your opinion Mrs. Brown's jaw was broken from a convulsion which contracted the muscles in her jaw; is that correct, sir? A. No, I didn't say it was a convulsion. I think that was your language, Mr. Mendelsohn.

THE COURT: The witness said muscle contraction, Mr. Mendelsohn.

BY MR. MENDELSOHN:

Q. Muscle contraction? A. Yes.

Q. And how did this muscle contraction come about, Doctor?

108 A. Well, it is difficult to say what incited the muscle contraction. But I believe that the tooth itself acted as a wedge and a support for the body of the bone. The impacted tooth took up or occupied so much of the area that it reduced the amount of bone, particularly at the lower border of the body of the bone. So that when the tooth was finally removed the main support of the body of the bone evidently was gone. So that any change of that sort might immediately stimulate a contraction of the muscle.

Q. You are not sure, though, Doctor, that that is the way? A. No, I am not sure. I feel that that is the only possible explanation that there could be for it.

Q. Doctor, when Mrs. Brown was sitting in the chair and you were looking at those X-ray pictures before you operated, did you tell her or warn her about this muscle contraction that could have

happened? A. I didn't see any necessity for it.

THE COURT: Answer the question.

THE WITNESS: No, sir.

BY MR. MENDELSOHN:

Q. You took X-rays of her jaw following the break, is that right, Doctor? A. Yes, sir.

Q. Was this a straight break or was this a comminuted break?

109 A. No. It was a straight break.

Q. A straight break? A. Yes.

Q. Wasn't this bone splintered Doctor? The jaw bone splintered? A. I don't think in the line of fracture that there was a splintering. The splintering that was present was as a result of cutting away the bone, so that we could get to the tooth to remove it.

Q. If this was a comminuted fracture, it would be splintered, would it not, Doctor? A. Well, it would be broken up into a variety of pieces, a number of pieces.

Q. But you say that that did not happen in this particular case? A. No.

Q. Now, I think you stated that you phoned Doctor Dick five or ten minutes after you discovered that Mrs. Brown had a fractured jaw; is that correct? A. Well, I called the doctor very shortly after the accident. I wouldn't say five or ten minutes, because I don't know.

Q. How long after that, Doctor? A. In a very short period of time.

110 Q. Was that within a half hour, would you say? A. Most certainly.

Q. Where did you call him at? A. At his office.

Q. And did you talk to the doctor? A. No, I did not talk to the doctor?

Q. Did you leave word there for the doctor to call you? A. I certainly did.

Q. But he didn't call you, did he, Doctor? A. They didn't call me for some time; although we called his office repeatedly.

Q. You say he did call you back at your office? A. Eventually he did.

Q. When? A. Some time perhaps maybe three o'clock.

Q. Was he at the hospital at that time when he called you? A. I think he was at Prince George's County Hospital, to the best of my recollecdion.

Q. Was Mrs. Brown still in your office when he called you? A. Yes, sir.

Q. And what was the conversation you had with Doctor Dick? A. I explained to Doctor Dick what had happened. And I told him that

111 I thought there was a problem of open reduction in this case which made it necessary for an external incision. And I was prompted to do this because of his experience as a plastic surgeon and also because of the fact that he had a dental degree in addition to his M. D., and that he had a special knowledge of this type of thing, and I felt that if there was an external incision that he would get the best possible result.

Q. All right, Doctor, now what did Doctor Dick tell you on the phone when you told him all this? A. What -- well, he said I will take care of her.

Q. He said I will take care of it? A. Yes, sir.

Q. Did he ask you where the patient was? A. I don't know whether he asked me or whether I told him. But he was informed that she was in my office.

Q. Did he tell you to get the patient to the hospital? A. Yes, he did.

Q. Now, you were there when Mrs. Brown's husband came to your office? A. Yes, sir.

Q. And he asked you where his wife was, did he not? A. No. I had already told Mr. Brown where his wife was.

Q. Where was she?

* * * * *

112 A. She was in my office, in the rest room.

Q. And did he go back into the rest room then after you told him that? A. When he came in I brought him right in to see his wife.

Q. What time of the day was this? A. There, again, I am not sure of the time. But I think it was somewheres around two or two-thirty.

Q. You are sure it wasn't four o'clock, Doctor? A. I doubt very much it was four o'clock. I had difficulty in reaching Mr. Brown. I called Doctor Hurley to see where I could get, as I thought, Mr. Fisher, and Doctor Hurley told me that it was Mr. Brown. And he also told me that Mr. Brown was employed with a Jack Blank Pontiac Automobile Company. And I called there and for some reason or another, they didn't seem to know who Mr. Brown was.

Q. Doctor, did you finally contact Mr. Brown? A. Yes. He called me back in response.

Q. What did you tell him, sir? A. I told him then what the situation was with his wife; that she was in my office, that I had been endeavoring to contact Doctor Dick, and that as soon as Doctor Dick contacted us, we would proceed with whatever was necessary.

113 Q. Doctor, when you were working on Mrs. Brown, you had other patients in your office, did you not? A. I don't think so. I think that was one day that we did not have any other patients. And to the best of my recollection, we did not work on any other patient that day, from that time on.

Q. Now, you said you attempted to wire her jaw yourself, after you found out her jaw was broken? A. That is right. I started to.

Q. And you didn't complete the job, did you? A. No, because after I saw what the situation was --

Q. You saw it was in pretty bad shape?

THE COURT: Let the witness finish his answer before you ask your next question.

A. No. I felt that the approach that I was making would probably not be the best approach. We have several problems in that type of work. One of them is of prime importance. In order to place a wire through the body of the bone, it is first necessary to make a hole, or a number of holes through which would pass the wire. One of the important things is to avoid any intervention with the mandibular nerve or with the mandibular artery and vein. And since the jaw was abnormally small, I felt that under the circumstances that I could not do the best service for this patient. And therefore I felt that there was a need for consultation and help in this case.

114 Q. Are you through, sir? A. Yes, I think so.

Q. When Mr. Brown came to your office, he left your office to get Doctor Greenfield, did he not? A. No. To the best of my knowledge, Mr. Brown met Doctor Greenfield in the lobby downstairs.

Q. And did he bring Docdor Greenfield up to your office?

A. Yes; he did. Doctor Greenfield came up with him.

Q. Did Doctor Greenfield examine Mrs. Brown in your presence, in your office? A. He looked at her, but there was no further technical examination of her.

Q. Doctor, you didn't call Doctor Greenfield, did you?

A. No, I didn't.

Q. So Mr. Brown went down to get him; isn't that right?

A. No, I don't believe that he did. He accidentally ran into him.

* * * * *

115 BY MR. MENDELSOHN:

Q. Had he been in your office first, Doctor, and then left and brought Doctor Greenfield up? A. He had been in my office. And he did leave my office. He did leave the office. And then he did return with Doctor Greenfield.

Q. Mr. Brown carried his wife out of your office, did he not, Doctor? A. No, he did not carry her out of the office.

Q. Did you see Mrs. Brown leave your office? A. I certainly did.

Q. Did she walk out of your office? A. She certainly did.

Q. No help at all? A. No. She had help.

Q. Who helped her? A. Mr. Brown had her by one arm, and Mrs. McCormack, the nurse in my office, had her by the other arm. She was ambulatory. But she needed assistance to avoid any possible --

Q. Was she fully conscious? A. Well, I think that she was pretty well oriented, although there was still some overhang from the effect of the sodium pentothal and the sedative which I had given her. And I think rather the overhang was from the sedative because of the duration.

116 Q. Doctor, yesterday you said that Mrs. Brown was a nervous, resistant patient. Are those the words you used? A. A nervous and what?

Q. Resistant? Did you use that word, a resistant patient? A. Well, she was nervous. And I think that she exhibited a little more than the average nervousness. But that isn't particularly a problem with us. We expect, in many cases, to have people nervous. As far as the term "resistant" was concerned, we were only talking about, not her cooperation, and not her attitude generally speaking, but her action under the effect of the anesthetic.

Q. Was it anything unusual, Doctor, for a woman patient to be nervous before she was to have an impacted tooth removed? A. I don't think so. I would be nervous myself.

Q. That would be the usual thing then, Doctor? A. I would think so.

* * * * *

117 Q. Would you have pulled this tooth, Doctor, if you thought there was a possibility of breaking Mrs. Brown's jaw? A. If I was certain there was going to be a fracture of the jaw, I certainly would not.

Q. You would not? A. Yes, sir.

Q. Doctor, was Mrs. Brown still under the influence of sodium pentothal and conscious when you attempted to wire her jaw? A. Oh, yes. She still had some of the effects of the drug.

Q. Doctor, are you familiar with Physicians' Desk Reference? I guess you have that in your office, have you not? A. Yes, sir, I do. Yes, sir.

MR. WELCH: May we approach the bench?

THE COURT: You may.

(At the bench:)

MR. WELCH: I think he is invading the field of making this doctor an expert witness for the plaintiff. I don't think that protects him under Rule 43. I think if he wants to make this doctor an expert witness that he has to take him as his own witness.

118 THE COURT: I don't know what the question is going to be. I can't anticipate what your question is. What is your next question to the witness?

MR. MENDELSOHN: Your Honor, I am going to ask him whether he is familiar with sodium pentothal. That is what he injected into this plaintiff. And then I want to ask him some questions on this. I am going to read this to him.

THE COURT: What is the point? What are you trying to bring out by this interrogation?

MR. MENDELSOHN: I am trying to prove, Your Honor, that giving sodium pentothal is very dangerous if you don't give the right dosage; that it shouldn't be given in the office and it should be given

by an anesthetist, by one who performs anesthesia.

THE COURT: I don't know how that fits into your case. Your complaint is for malpractice for having broken the jaw. I don't know what the administration of the anesthetic has to do with it.

MR. MENDELSOHN: Well, I may bring in a witness later -- I am not sure, it depends upon how he is going to answer this question -- I may bring an anesthetist into this trial.

THE COURT: I think this is without the framework of the pleadings. I don't see that you have charged this defendant with any

119 malpractice in the administration of the anesthesia. If that is what you are attempting to do at this time, I believe that I must sua sponte rule that this is not within the complaint which you have brought.

* * * * *

120 THE DEPUTY CLERK: Plaintiff's Exhibit No. 6 marked for identification.

(Letter dated 9-26-62 was marked Plaintiff's Exhibit No. 6 for identification.)

THE COURT: Are you tendering this exhibit in evidence at the present time?

MR. MENDELSOHN: I am.

THE COURT: Is there any objection, Mr. Welch?

MR. WELCH: No. I say I have no objection. I see no reason why the man needs to be called to testify about it.

MR. MENDELSOHN: He was here and, instead of testifying, I thought you would agree to stipulate.

MR. WELCH: That is what I am saying now.

THE COURT: The Court will admit Plaintiff's Exhibit No. 6 in evidence.

(Plaintiff's Exhibit No. 6 for identification was received in evidence.)

* * * * *

126 DR. ALFRED R. GREENFIELD,

called as a witness by the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. State your name, Doctor Greenfield. A. Alfred R. Greenfield.

127 Q. Are you a medical practitioner, Doctor? A. I am.

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Q. Do you specialize in any field of medicine? A. Internal medicine and psychosomatic.

Q. Doctor, what medical school did you graduate from? A. University of Bern, Switzerland.

Q. How long have you been practicing in the District of Columbia? A. Sixteen years.

Q. Doctor, do you know the plaintiff, Mrs. Grace Brown? A. I do.

Q. Was she a patient of yours, Doctor? A. She is.

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129 Q. Doctor, did you see Mrs. Brown on July 1, 1958? A. I did.

Q. How did you come about seeing her on that particular day? A. I closed -- I closed my office, I left the office about, sometime about four o'clock, which I usually leave to go to the hospital calls. I met Mr. Brown, outside.

Q. Where did you meet Mr. Brown? A. In the hall, 1029 Vermont Avenue, outside my office.

Q. And as a result of meeting Mr. Brown and this conversation with you, what did you do? A. He got panic and told me to go upstairs, his wife, something had happened.

THE COURT: Keep your voice up.

A. Something happened. I was to go upstairs to the dentist's office, Doctor Keaveny's office.

Q. And did you go upstairs with Mr. Brown? A. I did.

Q. And where was Mrs. Brown at that time, Doctor? A. She was in the -- one of those rooms, lying down on a sofa, in a back room. I guess it is a recovery room, in Doctor Keaveny's office.

Q. Did you examine her at that time, Doctor? A. As much as I could.

130 Q. Was there any history given you at that time? A. I didn't know what had happened. It is vague. It was four years.

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Q. Doctor, did you talk to Doctor Keaveny when you reached his office? A. I must have. Sure. I don't go into a strange doctor's office without permission. Yes.

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131 Q. Without looking at your records, Doctor, do you recall what Doctor Keaveny told you? A. I cannot pin myself down to that.

Q. You may look at your records. A. I must refer to the records.

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A. I was told by Doctor Keaveny that there was a fracture post extraction. Hospitalization was agreed upon by both Doctor Keaveny and myself. That is what I have in my records.

Q. What happened after that then, Doctor? A. I made arrangement for hospital. I checked the patient. She was under sedation and I found out pentothal had been used. So she was under sedation.

Q. Was it at your suggestion that she go to the hospital?

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132 A. As my record shows, hospitalization was recommended. And I called in a plastic Surgeon.

Q. Did you see Mrs. Brown leave Doctor Keaveny's office for the hospital? A. I do not remember.

Q. Do you know how she got to the hospital? A. I do not remember. I left and went myself to the hospital. Her husband took her.

Q. Did you go to the hospital that day, Doctor? A. That afternoon, yes.

Q. And you recall about what time you got there? A. Well, it has been some time before five. Vermont Avenue to Washington Hospital Center. At that time of traffic, thirty minutes or so.

Q. And did you further examine Mrs. Brown at the hospital, do you recall? A. At the hospital.

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133 Q. Doctor, did you at that time contact anyone at all? A. I contacted Doctor Dick.

Q. How did you do that? A. Telephone.

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Q. Do you know whether Doctor Dick came to the hospital? A. He came that same afternoon.

Q. Did you see him at the hospital? A. I did.

Q. Did you visit and treat Mrs. Brown while she was in the hospital at any time? A. I was there daily as her medical physician.

Q. And did you see her there daily, did you say? A. I did.

Q. And what were you treating her for? A. Medically, for anemia, for anxiety, and also for nutrition.

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134 Q. What condition was Mrs. Brown in at the hospital, Doctor? A. She was under sedation. Still had effects from sedation, from the pentothal. And she had reduction of the jaw by Doctor Dick. And it was wired. Immobilized. I have to look at my report. I must refer to it.

Q. Did you observe the patient, Doctor, eating at any time? A. She couldn't eat. The jaws were wired. She was on a liquid diet.

Q. How did she get that liquid diet? A. They have a glass tube, put in the corner of her mouth, and then she had some intravenous feedings.

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135 Q. Did you see Mrs. Brown when she returned home from the hospital? A. Saw her in my office on July 12. She got out of the hospital July 10, '58. She was to my office July 12.

Q. Doctor, at any time prior to that occasion did you diagnose her injury? A. I don't -- Naturally if she had a fractured jaw.

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136 Q. Doctor, did you at any time look at the X-rays of her jaw? A. No. I am not qualified.

Q. Doctor, tell us what treatment Mrs. Brown received after she returned from the hospital? A. Complex injections intravenously, liver B12 intramuscularly.

Q. What was that for? A. To build up her resistance and for her anemic status, in the vitamin supplement. She was unable to have a proper diet, during the entire time.

Q. Do you know whether Mrs. Brown returned to the hospital? A. Yes. She returned. She was rehospitalized September 28, '58.

Q. Did you see her at the hospital on that occasion? A. I did.

137 She was reoperated by Dr. Dick.

Q. Did you treat her, Doctor, at that time? A. Medically. And she was rehospitalized October 14, '58, until October 22, '58.

Q. Up to October 14, 1958, had you been treating her right along since July 1, 1958? A. I have. I had.

Q. And was it for the same condition, Doctor? A. Same condition, yes.

Q. Had Mrs. Brown lost any weight? A. Yes. She used to weigh 134. And down to 126 at time, and 127. Lost about 7 or 8 pounds.

Q. Doctor, how long a period of time did you treat Mrs. Brown for this anemic condition? A. For that particular illness, let's see now. January 7, '59. January 7, 1959.

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138 Q. Doctor, you had stopped treating Mrs. Brown at one time for this anemic condition, had you not? A. That is right.

Q. What was her condition at the time you last saw her for this anemic condition?

MR. WELCH: May we have the date fixed?

A. The last time I treated Mrs. Brown for anemia, 12-10-56.

BY MR. MENDELSOHN:

Q. That was about a year and a half, wasn't it, sir, before July 1, 1958? A. That is right.

Q. Doctor, have you an opinion, based upon reasonable medical certainty, whether this broken jaw which she sustained on July 1, 1958, caused the recurrence of this anemic condition, and run-down condition? A. Because of the fractured jaw nutrition was not normally possible, so there is a possibility that anemia would be caused.

MR. WELCH: I move that the answer be stricken out, Your Honor.

THE COURT: On what ground?

MR. WELCH: On the grounds that he was asked if he had an opinion. He hasn't stated that he did have an opinion. He has merely
139 stated a theory upon which a possibility might exist. Not responsive.

THE COURT: The motion will be denied.

BY MR. MENDELSOHN:

Q. Doctor, will you give us the reason for that opinion? A. Well, any normal individual, who does not eat properly and get proper nourishment, it is natural course, it is going to happen, lower resistance and blood will be reduced. The hemoglobin will be reduced. Hemoglobin is the factor of anemia.

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140 CROSS-EXAMINATION

BY MR. WELCH:

Q. Doctor, when you arrived in Doctor Keaveny's office, with Mr. Brown, what examination did you personally make as to Mrs. Brown's condition? A. All I examined was -- she was under anesthesia. She couldn't do much. So just the reflexes, or just short examination. Just routine. Not much to it. Can't do much --

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Q. You did speak to some extent with Doctor Keaveny? A. I did.

Q. And learned the reason that Mrs. Brown was still there in
141 his office? A. Yes. In his recovery room, yes.

Q. Didn't Doctor Keaveny tell you that he was keeping Mrs. Brown there waiting to hear from Doctor Dick whose office he had contacted? A. I do not remember. It is possible. But I do not remember.

Q. What time was it when you telephoned to Doctor Dick yourself? A. It must have been some time from that visit upstairs to the time I got to the hospital, because Doctor Dick was there promptly at five o'clock. Some time between 4:00 or 4:15 and 5:00.

Q. You didn't call Doctor Dick from Doctor Keaveny's office, did you? A. No.

Q. Weren't you there in Doctor Keaveny's office when Doctor Dick called back in to Doctor Keaveny's office and Doctor Keaveny talked to Doctor Dick? A. That I don't remember.

Q. Or do you recall when you first spoke to Doctor Dick that he had already been acquainted with the details and circumstances of the case and had already told Doctor Keaveny that he would take care of the patient? A. Sir, you are trying to pin me down. I do not
142 remember. That is four years.

Q. I am only trying to get your best recollection. A. I know. But I don't remember. It's pretty hard. I don't even remember yesterday.

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146 Q. What is your personal recollection, sir, to indicate why Mrs. Brown was returned to the hospital September 28, 1958, or do you recall without looking at your record? A. No, I do not.

Q. Can you refresh your recollection by your record? A. That was September --

THE COURT: 28, 1958.

A. The reason why is that Doctor Dick, plastic surgeon, wanted to

repair separation of the fragments of the right mandible, which is the right jaw. That was the reason why, it was Doctor Dick's repair job. Repair work on the jaw.

Q. Did you see her in the hospital on the occasion that she returned, September 28, 1958? A. I did.

Q. What did you observe? A. She had pain, tenderness, swelling, and she was uncomfortable.

THE COURT: And what?

A. Uncomfortable. And the X-ray report by the X-ray doctor at
147 the hospital, the report shows displacement of the jaw. Of the fragments of the jaw.

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BY MR. WELCH:

Q. Do you have any personal recollection actually, Doctor, of what Mrs. Brown's condition was when she went into the hospital September 28, 1958, and what was done for her by Doctor Dick? A. She had pain, still had pain, tenderness and swelling. And it is suggested he recheck. Did not understand why the fragments of this mandible bone did not heal. And he had to do some more wiring. I have his report here some place.

* * * * *

148 Q. Let me try to get clear an answer to one question first. Does a condition of acute anemia, such as you diagnosed that Mrs. Brown had at one stage, does that in itself interfere or retard bone healing? A. If she stay on an anemic stage below 8 and don't replace it, you have loose calcium. You cannot stay on a continuous anemic state. Secondary anemia, from 65, 75, you could live. A lot of people live around with 65 hemoglobin, still do a day's job.

Q. All I want to know, if you can tell me yes or no, does acute anemia or would acute anemia interfere with and retard bone healing? A. It depends on the grade of anemia.

Q. Was her rate of anemia checked in the hospital in September, or September 28 or immediately thereafter, 1958? A. It must be --

routine examination. Routine admission of every patient goes to the hospital, they have a routine blood count and so forth.

Q. I am only trying to determine from your recollection, do you know? A. I have October -- one moment. I have October here and that is all right. October.

Q. Doctor, what is all right in October? A. She still had slight anemia which was near normal, yes.

149 Q. What does your record show the anemia was in October 1958? A. 12.5. 39.5. Almost normal.

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156 REDIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. Doctor, you testified to a lot of questions Mr. Welch asked you about anemia that Mrs. Brown had after this occurrence of July 1, 1958. But on your direct examination you stated that for a year and a half before this occurrence you had her anemic condition under control; is that right, Doctor? A. That is right. I didn't see her.

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DR. ARTHUR DICK

was called as a witness by the plaintiff and, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. Will you state your full name, Doctor Dick. A. Arthur Dick.

157 Q. You are a practicing physician in the District of Columbia? A. Yes.

Q. How long have you been practicing? In the District? A. Since I returned from the service in 1946.

Q. What medical school have you graduated from? A. Georgetown.

Q. And where did you serve your internship? A. At, now D. C. General. Then Gallinger.

Q. Do you specialize in any particular practice of medicine? A. Yes.

Q. What is that, Doctor? A. Plastic surgery. Maxilla location and plastic surgery.

* * * * *

158 Q. Doctor, do you know the plaintiff in this case, Mrs. Grace Brown? A. Yes.

Q. And will you tell us where you first met Mrs. Brown, and when? A. May I use my record?

Q. You may, Doctor. A. I have known Mrs. Brown as a patient since January 1956, at which time she was injured in a fall at home and sustained a laceration and fracture of the jaw.

Q. What jaw was that, Doctor? A. The lower jaw. The mandible.

Q. What side of her face? A. Left.

Q. Did you treat her for that condition at that time? A. Yes, I did.

Q. Doctor, when was that date? A. January 29, 1956.

Q. Now, when was the next time you saw Mrs. Brown? A. After the completion of the treatment for this condition?

Q. Yes. A. July 1, 1958.

Q. And, Doctor, will you tell us under what circumstances you saw Mrs. Brown on July 1, 1958? A. I was called to see Mrs. Brown

159 for a fracture of the mandible on the right side.

Q. Doctor, do you know who called you for that? A. Yes, Doctor Greenfield.

Q. Now, will you tell us, if you recall, Doctor, where you were when Doctor Greenfield contacted you? A. I was in my office.

Q. And do you recall about what time of the day this was? A. I saw, from my notes, I saw her on that same day that I got the call at Washington Hospital Center at 5:00 p.m.

Q. How soon before that did you get the call, Doctor? A. I don't recall exactly. I have no record. But it was probably mid-afternoon. The reason I say probably, because it was in my office and I left at five, the completion of my hours.

Q. Was that the first time that day that you heard of Mrs. Brown being in the hospital? A. As I recall, yes.

Q. Doctor, did you go to the hospital? A. Did I go to the hospital?

Q. Yes. A. Yes, I did.

Q. What hospital was it? A. The Washington Hospital Center.

160 Q. Did you see Mrs. Brown there? A. Yes, I did.

Q. Did you examine Mrs. Brown? A. Yes, I did.

Q. Will you kindly tell us what your examination revealed? A. I checked Mrs. Brown and then went down to see the X-rays, which showed a fracture displacement of the mandible on the right side, and I realized she would have to have more than just a simple operation and she was scheduled for operation the following morning.

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THE DEPUTY CLERK: Plaintiff's Exhibits Nos. 7-A, and 7-B marked for identification. Plaintiff's Exhibits No. 7-C and 7-D marked for identification. Plaintiff's Exhibits No. 7-E and 7-F marked for identification.

THE COURT: Are you offering these exhibits in evidence?

MR. MENDELSOHN: I am, Your Honor.

THE COURT: Is there any objection?

MR. WELCH: I understand these are the X-rays from the

161 hospital records, Your Honor?

THE COURT: They were identified earlier as the X-rays from the hospital as Plaintiff's Exhibit No. 7 for identification.

MR. WELCH: No objection.

THE COURT: The record will indicate the admission in evidence of Plaintiff's Exhibit 7-A through 7-F.

(X-ray negatives marked Plaintiff's Exhibits 7-A through 7-F and received in evidence.)

* * * * *

Q. Doctor, will you tell us the first X-rays that were taken at

the hospital, Washington Hospital Center? A. This is marked as July 1, which was the day of admission.

162 Q. Now, Doctor, on that X-ray, July 1, will you kindly point to the jaw that was fractured. A. Here is the part of the jaw here that is overlapped. Looking down on the right side of the jaw, from the left where they are taken. This is the back part of the jaw that runs up toward the ear, that is elevated and overlapping the front part of the jaw.

Q. By overlapping, Doctor, do you mean out of place? A. Out of place.

Q. Now, Doctor, is that fracture a straight fracture or a comminuted fracture? A. Well, it is not comminuted but it is compounded, to the outside.

Q. What do you mean by that, Doctor? A. Broken through the tissue.

Q. Was there a crushing of the bone there, Doctor? Any fragments? A. No. No. None is seen and none is reported.

Q. Doctor, here is one which was taken July 1st. Will you kindly interpret that X-ray to the Court and jury. A. This is one that is taken with the head down, shot from behind, so you can see the relative spread of the lower jaw. And it shows some break in continuity; at least some separation of the fragments.

Q. And where is the break in that picture, Doctor? A. Well, this is distorted a little bit because of the curve of the jaw, but it

163 is in the back part of the lower jaw, right about in here.

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Q. Will you interpret those other pictures. A. This film was taken the following morning.

Q. What exhibit is that, Doctor? A. 7-A. Excuse me. Two days later. That is to say, the day after operation. Showing the ends considerably improved over what they were, with this overlapped partially corrected and held in place with a wire. This opaque thready business that you see in here, is wire holding the fragments in better

position after the operation. This is 24 hours or thereabouts following the operation.

Q. Does that show where the overlap is pulled back in place, Doctor? A. Yes. And confirmed by the radiologist report.

164 Q. How about those other X-rays? A. Well, this is a front view, which is comparable to this one before the operation, showing that some of the dark area in here, which was a place where the bone was not in contact, now in reasonably good contact, and held with the wires. This is the left side which shows it normal and undisturbed, only taken as a control or for the sake of comprehension. It is not relevant here.

* * * * *

Q. When you arrived at the hospital, Doctor Dick, what was the condition of Mrs. Brown at that time? A. Well, I am sure I must have made a note on the hospital chart. I didn't in my own record, except she was pretty sick -- a fracture of that kind.

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Q. Did you receive a history, Doctor? A. The history I got was that the mandible was fractured as a result of difficult removal of the first molar.

Q. Doctor, I want you to explain to the Court and jury just what you did in this operation on Mrs. Brown's jaw. A. Well, without going into the actual report, a copy of which I have, an incision is

165 made through the skin, and the broken fragments exposed, isolated, brought in contact and wired in position. Then the lower jaw is wired to the upper jaw for further fixation. I could not do that at the time. I did the wiring of the bone, because in locking the jaws together, as one must necessarily do, because the wires themselves are not enough to hold it, there is always a risk of having the patient vomit right after an anesthetic and I didn't want any trouble in having some of the contents be inspired. So we put that off for forty-eight hours, then went back and completed by putting bars on the teeth and then locking the lower jaw to the good upper jaw and left it that way.

Q. Doctor, when you say you reduced the fracture, did you work from the inside of her mouth in reducing the fracture? A. Outside.

Q. Tell us how that was done. A. Through an incision on the side of the neck, under the jaw, and then exposing the jaw and delivering the fragments of bone and making holes and wiring it. When the bars were put on, two days later, then we do that on the inside of the jaw.

Q. This incision, Doctor, is later sutured?

* * * * *

166 A. Yes.

Q. Now, when did you see the patient next? A. Well, I saw her daily in the hospital. The stitches were removed on the 9th of July, which was one week after the operation, and to be discharged tomorrow by Doctor Greenfield who was checking her general condition all the time.

Q. Now, as long as she was in the hospital, Doctor, and in your visits to her in the hospital, will you explain whether Mrs. Brown was in any pain at that time? A. They generally are.

Q. When was the next time you saw her? A. I saw her in my office. She was discharged from the hospital on July 10, '58, and I saw her in my office on the 16th of July.

Q. And did you examine her there? A. Yes. The position of the teeth was good. No treatment. To contact me in a week.

I saw Mrs. Brown again on the 29th of July. There had been a little swelling which was subsiding and the teeth were still in good position.

Q. When was the next time you saw her? A. August 25, 1958, at which time the wires were removed, unlocking her jaws.

Q. How did you do that? A. That is done with a pair of surgical pliers and cutting the wires and taking all the appliances out.

167 Q. In all that time her jaws were together? A. Yes.

Q. Locked together? A. Yes.

Q. What was her condition then, when you took the wires from the jaw? A. Well, I can't tell you specifically. I don't have notes to that effect. But she was the usual convalescent individual following a fractured jaw and still had to stay on liquids. This was the usual postoperative deportment.

Q. Did you see her again? A. Yes. I saw her on the 17th of September. This is now about three weeks later. And there were complete separation of the fragments.

Q. What do you mean by that? A. The fracture, there was no union. And the bone didn't unite, in spite of the fixation. The wires had been on for -- well, from July 2 to August 25. That is roughly seven weeks. Under which condition ordinarily they should heal. In this case there was a nonunion. This happens occasionally.

Q. Did she have any complaints at that time? A. I am sure she must have been very uncomfortable with a jaw that wasn't functioning properly.

168 Q. Where there is a nonunion of the bone, Doctor, is there soreness at that spot? A. Yes.

Q. As a result of that examination, what did you do? A. Well, before we got to do anything we had to let some of the swelling subside. I saw her then twelve days later, on September 29, 1958.

Let me go back just a second to complete the note on the 17th of September: Complete separation of the fragments will require another open reduction and probably plating of the jaw. This is a metal plate that was to secure the fragments. Twelve days later there was an abscess, and I had to open it.

Q. How did you open it? A. With a knife.

Q. From the outside? A. From the outside.

Q. Doctor, did you have to cut through that same incision that was there prior to that when you made your first? A. I don't believe that was at the site of the incision. It was probably just below the margin of the bone.

Q. Was that a painful thing, Doctor? A. Yes. Especially down in the office. We had to do it quickly because it was ready to be opened.

169 Q. Did she get some anesthesia for that? A. No. That is a bad time to use anesthesia -- local anesthesia, anyway -- through infected skin.

Q. Then what happened, Doctor? A. The next day I saw Mrs. Brown, and the swelling had subsided considerably. And an operation was rescheduled. Rescheduled for October 15, 1958.

Q. Was that operation performed? A. It was.

Q. Where at? A. Washington Hospital Center.

Q. And tell us what you did on that operation. A. The old scar was completely removed. The body of the jaw was idientified and a plate was inserted to accurately fix the fragments. Now at this time there was some infection in the bone and some bone was lost. After the plate was applied it was found that it so distorted the lower jaw that it was impossible to get any kind of approximation of the upper and lower jaws. So after having finished this I had to start all over again. At the same time, open up the wound, take off the plates, try another wiring and then immobilize her jaws.

Q. Doctor, how did she lose some of this bone you are talking about? A. Infection.

Q. Is there a name for this particular infection that she had?

170 A. Osteomyelitis.

Q. Will you explain what osteomyelitis is. A. It is an infection of the bone marrow and the bone.

Q. Did you treat that osteomyelitis? A. We did with antibiotics.

Q. Did you see her at the hospital while she was confined there from October 14th? A. Oh, yes. Because we operated on the 15th and then took her back to the operating room on the 20th of October now to put new arch bars on the teeth and again to immobilize the jaws.

Q. What are arch bars? A. It is a metal piece of wire or flattened wire that fits to and around all of the teeth on the upper and

lower jaws with little prongs so that after they are wired to the teeth they can be wired to each other to keep the jaw shut.

Q. When you put that in her mouth did she get some anesthesia? A. No. It is not necessary for this.

Q. Unnecessary. Now, when was she discharged from the hospital, Doctor? A. This was the procedure on October 20. She was discharged on the 22nd, two days later.

Q. And when she was discharged did she have her teeth, upper and lower teeth, wired together at that time? A. Yes. Well, at this
171 time I didn't use wires. I used rubber bands, which are more effective and give us a little bit more latitude and movement of the teeth.

Q. Was she able to eat while her teeth were wired together? A. Liquids only.

Q. Do you know how long these wires were on her mouth after the second operation? A. Yes. They were put on October 20th. And they were removed on December 22nd. Approximately two months.

Q. Did you see her on the date these wires were removed? A. I removed them.

Q. You took them off? A. I did.

Q. What was her condition then? A. Well, again I don't have any specific notes here and it's four years ago, but she -- as always, these people lose weight. They are not particularly happy after having nothing in solid food for two months.

Q. Doctor, do you know how much weight she lost? A. No, I don't.

Q. In your observation of her, could you tell that she had lost weight from the first time you saw her? A. I don't have any record to that effect, but unquestionably she lost weight.

172 Q. When was the next time you saw Mrs. Brown? A. Saw her again January 9, 1959. And at that time we were suggesting a possibility of having her teeth balanced, so that her occlusion would be improved.

Q. What do you mean? A. Teeth have to be ground down in various spots because they are never back to exactly where they were, particularly after repeated procedures like this, so we have her occlusion balanced by grinding off high spots in one place or maybe building up in another place so she could have a good functional bite.

Q. Did you perform that, Doctor? A. I don't know. Her dentist, Doctor Hurley, was the one to whom I spoke at that time for getting this treatment started.

Q. Until that was done, Doctor, could she chew any food, heavy food? A. Not anything really solid.

Q. All right, Doctor, when did you see Mrs. Brown again? A. That date was January 9. I saw her again on the 12th of January. The swelling was subsiding from all of the surgery. No other changes.

I saw her again on March 14, '59, at which time we thought it was safe to proceed with the balancing of the occlusion.

173 Q. At that time, Doctor, the last time you saw her, did she need any other work on her mouth? A. Yes.

Q. What was that? A. I saw her on April 24, 1959, and my notes read: There is seen to be nonunion. And another operation will be necessary.

Q. What kind of an operation? A. Probably a bone graft.

Q. Will you tell us something about this, Doctor, this bone graft that would have to be done in her mouth? A. Well, when enough bone is missing between two ends, and if it does heal it will so distort the bone that you can never get her teeth to fit properly, you have to open this up, separate the jaws and however wide the defect is must be made up with something else. So we take a piece of bone and fill in the gap.

Q. Where do you get this bone from? A. Take it from her hip, usually.

Q. How long will she have to remain in the hospital for that performance? A. Oh, I would venture to say at least two weeks.

Q. Would her jaw have to be wired up again? A. Again.

174 Q. Do you know about how long the jaw would be wired after this operation? A. Two months. Minimum.

Q. How long will she remain in the hospital approximately, Doctor? A. I speculate about two weeks.

Q. What would be your prognosis in an operation of this kind? A. Well, with past experience it would be very guarded. Uncertain.

Q. Doctor, have you rendered a bill for services rendered Mrs. Brown? A. I have.

Q. To date. How much was that, sir? A. Six hundred dollars.

Q. Have you any idea, Doctor, what this next operation would cost? A. I would venture it would be just about that much more, if not more. Perhaps more.

* * * * *

CROSS-EXAMINATION

BY MR. WELCH:

Q. Doctor, were you in your office all afternoon the afternoon of July 1, 1958? A. I can't recall specifically if I was or if I wasn't.

175 I imagine I was.

Q. Did you learn from your office employees or from any other source that during that afternoon Doctor Keaveny had put in a call for you and was trying to reach you with respect to Mrs. Brown who was in his office? A. I don't recall. I don't recall. As a matter of fact, I was looking through my record in anticipation of coming down here, I noticed that I had a letter to Doctor Greenfield saying that he called me.

Q. Yes. But you knew Doctor Keaveny, didn't you? A. Yes. Quite well.

Q. As it stands now you have no recollection of having received in your office any information that in your absence that afternoon Doctor Keaveny had been trying to reach you? A. No, I don't recall. Although I did talk to Doctor Keaveny.

Q. You remember when you first talked to him? A. No, sir. I have no record and I wouldn't venture a guess.

Q. Would you be able to recall whether you talked to Doctor Keaveny that afternoon before you went to the hospital to see Mrs. Brown? A. I don't recall. I don't recall.

* * * * *

198 Washington, D.C.
Thursday, September 27, 1962

* * * * *

200 LLOYD S. STEWART

was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. Will you state your full name, Mr. Stewart? A. Lloyd S. Stewart.

Q. What business are you in? A. Photography.

Q. How long have you been in the photography business? A. Forty-five years.

* * * * *

Q. Mr. Stewart, I show you Plaintiff's Exhibit No. 1. What is this? A. X-rays of teeth.

Q. And were you requested to make an enlargement and a positive picture from that X-ray? A. I was.

201 Q. I show you this, Mr. Stewart, Plaintiff's Exhibit No. 2 for identification. Is that the positive? A. It is.

* * * * *

Q. Have there been any changes made on the negative or this positive? A. Not by me.

MR. MENDELSOHN: I ask this be admitted in evidence, Your Honor.

* * * * *

202 THE COURT: The Court will admit the exhibits in evidence.

(Plaintiff's Exhibit Nos. 1 and 2 for identification were received in evidence.)

* * * * *

205 DR. J. EDWARD HURLEY

was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. Will you state your full name, sir. A. J. Edward Hurley

Q. Are you a dentist, Doctor? A. That is correct.

Q. How long have you been practicing dentistry? A. Twenty-three and a half years.

* * * * *

Q. Do you know Mrs. Grace Brown who is seated here? A. Yes, I do.

Q. Had you been her dentist at any time? A. Since January 16, 1948.

Q. Now, since January 16, 1948, had you taken X-ray pictures
206 of Mrs. Brown's teeth at any time? A. Approximately every year and a half I have checked with full mouth X-rays.

Q. Doctor Hurley, I show you Plaintiff's Exhibit 1. Will you kindly look at this, sir. Did you take those X-rays? A. Yes, I did.

Q. When did you take them? A. I believe it was January 10th, 1959.

Q. Was that the last X-rays you took of Mrs. Brown? A. No. These were taken 4-28-58. I took them again January 10, 1959.

Q. Doctor, I show you this enlargement which is a positive picture. Is that a positive picture of the lower molar area of Mrs. Brown's mouth? A. Yes, it is.

Q. Doctor, had you at any time recommended Mrs. Brown to Dr. John Keaveny? A. Yes, I have.

Q. When was this? A. Right after that last picture was taken in 1958.

* * * * *

207 CROSS EXAMINATION

BY MR. WELCH:

Q. Doctor Hurley, what did you recommend Mrs. Brown to Doctor Keaveny for? A. Because of a gradual erosion and decay of an impacted second molar.

Q. And is that condition disclosed on one of these X-ray films which you have identified as having made at your office in April '58? A. It definitely is.

Q. And which one is it? A. The lower right second molar.

Q. Is that same film that is framed on the front side of the group of pictures with a red frame? A. That is right. These are the same pictures with one -- at a different and further angle back.

MR. WELCH: May we have the viewer, if Your Honor please?

BY MR. WELCH:

Q. Doctor Hurley, these small films, do they permit removal from this little cardboard framing for viewing on the light viewer? A. Yes, sir.

Q. Would you remove from the frame the films that you have just referred to as indicating the area of Mrs. Brown's jaw for which you referred her to Doctor Keaveny for treatment. A. These two.

208 * * * * *

Q. Doctor, what I would like to have you do is first identify the precise area disclosed on the two films indicating which film you are referring to. And then explain what diagnostically those X-ray films disclose. A. This is the lower right posterior part of the mandible, which is the lower jaw. And this is the third molar

209 sitting on top of the second molar. In other words, it is impacted. Cannot be erupted by itself. Over a period of years I have been taking pictures and watching that area, and there was no pathology until this particular day, and that starts in January 1948. There was no pathology shown up until this time. And when this pathology showed,

showed the eating away of this and slow absorption of bone, and then I suggested she consult with an oral surgeon, with the idea in mind of course to remove possibly one, in this case, both of those teeth.

* * * * *

MR. WELCH: Before we proceed further, may I ask that in some manner the clerk identify these two photographs as --

* * * * *

MR. WELCH: -- as exhibits as the films from the total exhibit No. 1.

THE COURT: They will be marked as Exhibits 2-A and 2-B.

* * * * *

BY MR. WELCH:

Q. Doctor Hurley, I am going to hand you a photograph which
210 has been marked for identification on the reverse side, Plaintiff's Exhibit 2, and ask you what if anything that photography reflects in relation to your own X-ray films of Mrs. Brown's jaw.
A. It shows in general the overall picture that occurs but in less detail, but sufficiently to know exactly what the pathological condition is.

Q. In other words, from that photograph and the absence of the X-ray film itself, you as a dentist are familiar with the X-ray films, could identify the pathology in this picture? A. You could identify the pathology.

Q. Will you stand down so that the jury can follow your explanation and point out to them, on the photograph, where is disclosed the pathology that caused you to refer this patient to Doctor Keaveny.

THE COURT: I would suggest that you ask the doctor to define the word "pathology."

THE WITNESS: Pathology means a diseased condition.

BY MR. WELCH:

Q. Will you do that, Doctor, please.

(The witness stepped in front of the jury.)

A. In blow-up of this film here, this cloudy area, darkened area, shows decay that has come in under this impaction. This is the impacted tooth and this is the third molar. Also there is a slight absorption of bone, which would take anyone that knew bone pathology to see that
211 this condition is not good, and should be checked. Because it leads to a possible osteomylitis, which means a slow deterioration and wasting away of the bone. This picture here, this is decay, and this over here shows a slight absorption of bone, making it sort of like a cheesey-like substance. In this condition these have to be removed.

* * * * *

Q. Do you by any chance, Doctor, happen to have with you the very original X-rays of this area that you took in 1948 which disclosed the same impaction absent the pathology which you have pointed out?

MR. MENDELSOHN: I object, Your Honor. That line of questioning is outside of the direct examination. If Mr. Welch wants to make him his own witness, Your Honor.

THE COURT: What do you say to the objection?

MR. WELCH: I don't think that is beyond the scope of direct examination. The fact of the existence of original X-ray pictures disclosing the impacted tooth area was testified to on direct examination.

THE COURT: The Court will overrule the objection.

Do you have those X-rays, Doctor?

THE WITNESS: I believe I have some heretofore, but it is the normal procedure, in my office and everyone else's, after five years,
212 of having X-rays, they are dismounted and discarded. But I

did not check in my files to see if I had any prior X-rays. We merely take them off this mount and put them in a little envelope and at the end of five years we discard them. They take up too much room.

BY MR. WELCH:

Q. Do you have one or more films of this area that were made several years prior to these that we are discussing? A. After five years, I would doubt it.

Q. Within the five-year period? A. Within the five years, these were taken not quite five years ago; 4-28-58. Now, prior to that I could check my files; and to see if I have any loose pictures, which we put them in a small envelope.

Q. You don't happen to have any with you? A. No. Because I turned these over to either Mrs. Brown or Mr. Mendelsohn, I am not sure which, at the time that they requested them.

Q. Doctor Hurley, had the nature of the impaction per se changed over the years, or was it merely eventually the change in the pathology around the teeth? A. The change in the pathology only. The actual situation and position of the teeth had not changed.

Q. Had you over the years, from 1948 to the taking of these pictures in April 1958, discussed this impacted area with Mrs. Brown?

213 A. Yes, I did.

Q. Had you made clear to her the nature of the impaction? A. I certainly did. I said it is one of the most unusual ones I had ever seen and as long as there was no pathology to leave the situation alone.

Q. Had you discussed with her what might be the hazard or dangers of removal if removal became necessary? A. I said it was most difficult to remove it and it should require the services of an expert or a specialist.

Q. Had you made that situation perfectly clear to her from time to time? A. I believe I had. I discussed it with her and I said I wouldn't have these taken out if they were not bothering me.

Q. And as her dentist were you satisfied that from your explanation of the X-ray pictures and the nature of the impaction that Mrs. Brown did thoroughly understand the dangers and the hazards of removing that tooth when it became necessary? A. That is difficult to say whether she thoroughly understood or not. I tried to make it clear to the best of my ability; that as long as there was no pathology evident, then leave the situation as it is, because it was too difficult an operation to tackle if there were no reason for it.

214 Q. Doctor, during the course of your practice, I assume that you do extract teeth yourself? A. The easy ones.

Q. Well, in the course of your experience and practice, would you yourself have attempted the extraction? A. I would not have attempted that. That requires the services of a highly trained specialist.

Q. Can you tell the Court and jury from your opinion whether even with the utmost of care and skill in the extraction of that tooth --

MR. MENDELSOHN: I object, Your Honor.

THE COURT: It is customary to permit counsel to complete his question.

Will you finish your question.

BY MR. WELCH:

Q. -- the extraction of that tooth would offer a hazard of fracture?

MR. MENDELSOHN: I object, Your Honor. The witness has already testified he is not an expert. And that requires an expert opinion, Your Honor.

THE COURT: Will you read the question, Madam Reporter.

(The pending question was read by the reporter.)

THE COURT: I think in the light of the witness's testimony that he has been practicing dentistry for twenty-three and a half

215 years, that the question is addressed to facts within his knowledge. I will overrule the objection.

Will you answer the question, Doctor.

A. In the removal of any impaction which is deep seated in the bone there is always a possibility of a fracture.

BY MR. WELCH:

Q. Doctor, will you tell us whether it would be because of this hazard and your appreciation of it that you chose not to undertake the removal of this tooth yourself after the pathology developed? A. Very definitely. I didn't feel that it was within my scope to attempt anything of this sort.

Q. Doctor, with respect to the pathology, as you have referred to it, in the X-ray films which you have explained to the jurors, you mentioned a possibility of the development of osteomyelitis. Will you explain a little more fully how this situation might develop into an osteomyelitis? A. Because of the pathology in the decayed area of the tooth and because of the pictures showing the gradual absorption of bone around the tooth involved.

Q. Doctor, tell the Court and jury if you have an opinion as to whether the presence of this pathology in itself would accentuate or increase the hazard of fracture at the time of the removal of this impaction. A. Eventually it would, because there would be scarcely
216 any bone tissue left if let go indefinitely.

* * * * *

Q. During the course of your several years, twenty -three years or more of practice, Doctor Hurley, have you had occasion to examine and study by X-ray film and by clinical observation many other impacted teeth? A. We run into that situation continually, on pictures.

Q. Then would you say that on many, many occasions you have had occasion to X-ray and to study by film and to study clinically conditions of impaction? A. I most certainly do. That is within the scope of my daily work.

Q. And as comparing impactions generally with the particular type of impaction that existed in Mrs. Brown's case, could you classify it as being more or less serious from the viewpoint of attempted removal
217 than the average impaction? A. That would be very easy to say. This is one of the most difficult impactions I have seen in twenty-three years. And it is most unusual that this particular tooth is being overlain by another.

* * * * *

REDIRECT EXAMINATION

BY MR. MENDELSOHN:

Q. Doctor Hurley, your testimony is that these last photographs you took in '58 prior to the time you recommended that Mrs. Brown go to Doctor Keaveny disclosed some decay, did you say? A. Definitely. Anyone can see this on the pictures.

Q. Doctor, wasn't that the same decay that was shown in her impacted tooth for a period of approximately ten years? A. No. There was no decay and no pathology prior to this picture that was taken in 1948.

Q. Doctor, when was the last time you took a picture of this particular tooth prior to 1958?

THE COURT: Just one minute.

Will you read the last question and answer, Madam Reporter.
218 (The reporter then read the question and answer requested.)

THE COURT: In 1948, Doctor?

THE WITNESS: That was 1958.

THE COURT: Go ahead.

Read the pending question please, Madam Reporter.

(The pending question was read by the reporter.)

A. That question I didn't answer but I can from my records: March 9, 1956.

BY MR. MENDELSOHN:

Q. Doctor, have you that X-ray there so we can look at it? A. From 1956?

Q. Yes. The one you took before this. A. I believe I mentioned that after five years we discard X-rays because of them taking too much room. They just pile up. After five years we feel that it is normal to dispose of them.

Q. Doctor, you knew that a suit was filed in this case, didn't you?

MR. WELCH: If the Court please, I object to this. Not responsive, on redirect examination. It is undertaking to discredit his own witness and I think it is highly improper.

THE COURT: I think the question is not a proper one. I will sustain the objection.

219 MR. MENDELSOHN: May we approach the bench, Your Honor?

THE COURT: You may.

(At the bench:)

MR. MENDELSOHN: The question goes to the credibility of the witness because he had pictures taken prior to '58 in '56. He is claiming that she had this decay in her mouth all along, that it was getting worse. I think I have a right to discredit the doctor, to show whether he took pictures to show the difference.

THE COURT: I don't think the question as to whether he knew a lawsuit was pending is a proper question. I have sustained the objection.

* * * * *

221 BY MR. MENDELSOHN:

Q. Doctor Hurley, during these years that you examined Mrs. Brown's tooth, did she complain to you of any pain in that tooth at any time? A. Not at any time.

* * * * *

222 MR. WELCH: Wish to make a motion, if the Court please, on behalf of the defendant, that the Court direct a verdict in favor of the defendant on the issues with respect to alleged negligence in the procedures of the defendant with reference to the extraction of

plaintiff's tooth, or teeth, and that there be a verdict directed on behalf of the defendant with respect to plaintiff's claim which is alleged to be predicated on the doctrine of res ipsa loquitur.

We do not feel that there has been any evidence offered of negligence in any respect with reference to the manners of the extraction of the teeth, and the procedures invoked by the defendant at the time of the extraction; nor do we think there has been any evidence offered which would indicate that this was the type of malpractice case in the District of Columbia which would permit of the assumption that absent negligence a good result would have occurred. On the contrary, the only evidence in the case is that this was a most unusual and difficult type of impaction to correct by extraction, and that it offered, if anything, greater and more hazard than the usual or ordinary type of impacted teeth.

Based upon those primary grounds, I respectfully move for a direct verdict in favor of the defendant.

223 THE COURT: That is on the issues of negligence and res ipsa loquitur?

MR. WELCH: That is all I wish to address myself at the moment. I don't want to confuse the situation.

THE COURT: Very well.

MR. DAVIS: If Your Honor please, on the issue of negligence, it is to be noted that the complaint merely charges negligence generally. At pretrial, if defense counsel desired, he could have had specific allegations of negligence spelled out. However, in the pretrial itself, there are no specific allegations of negligence requested or spelled out. Therefore I think we are entitled, under the present posture of the case, at the conclusion of the plaintiff's case, I think we have made out a prima facie case on the inferences drawn from the facts.

As the Court of Appeals has stated in the Christie v. Callahan case, 175 U.S. App. 133, malpractice is hard to prove. The patient is at the mercy of the physician, particularly, as in this case, where

the patient is under a double shot of sodium pentothal and knows nothing as to what went on. I think, under those circumstances, the doctrine of res ipsa loquitur does call upon the defendant to come forward and explain what he did or what caused the situation.

When we called him as an adverse party under Rule 43 (b), his testimony was he doesn't know what caused this fracture. The
224 first day of this trial he testified it was caused as a result of a convulsion or convulsive reaction. Yesterday he called it the result of a muscular contraction. I think Your Honor knows that this doesn't call for expert testimony. We have a lay jury here. Everyone of them has a human jaw. They know the jaw is one solid piece of bone. I think the defendant even characterized it as in the category of a baseball player breaking his arm in throwing a ball as a result of a muscular contracture. The arm is certainly not anywhere near comparable to the jaw. An arm has much more mobility than the jaw itself. And particularly, as the evidence shows here, this fracture was a compound and comminuted fracture. Compound meaning, of course, it comes right through the skin.

I think on that very point this jury has a right to draw the inference that in the technique, the manner described by the doctor of using this mallet and this chisel, that he possibly used more force than was reasonably necessary to chip away the bone around which this third molar was apparently impacted.

I think it is analogous, you might say, to the Amsterdam diamond cutter. If this was the difficult operation Doctor Hurley just said it was and as shown in his own X-rays, the most serious he has ever seen for twenty-three years of practice, I think this would call for a little more study by the defendant after taking his own X-ray.
225 Your Honor, a cutter studies a certain diamond for months before he takes that little chisel and makes one decided pitch. I think the jury has a right to consider that Doctor Keaveny in attempting this extraction did not properly study the X-rays that he himself took, let alone those that Doctor Hurley had taken.

I think that on the question of negligence there is enough in the present posture of the case from which this jury can draw proper inferences.

On the question of the result, we don't bank upon it being merely a bad result. Fortunately, the Court of Appeals has also spoken on that situation in the case of Byrom v. Eastern Dispensary, in 78 U.S. App., where the Court of Appeals said in that situation -- that was a broken arm required to be reset again -- the jury has the right to consider the character of the injury and the statements of the defendant dentist -- defendant orthopedist in that particular case -- in connection with the evidence of any so-called experts.

I think, on the issue of negligence, we have enough in here from the inference, particularly at this stage of the case, at the end of the plaintiff's case, whereby the plaintiff is entitled to any and all inferences. I think we have made out a case sufficient in negligence to go to the jury.

226 THE COURT: You are familiar with the case of Johnston v. Rodis?

MR. DAVIS: That is on warranty, Your Honor, yes.

THE COURT: I am not asking you about the matter of warranty. I am asking you about the comparison of the case on the question of res ipsa loquitur with the present case.

MR. DAVIS: Yes, I have read this case many, many times. In fact I read it again this morning, the opinion of Judge Edgerton, on this question of res ipsa loquitur. Of course the Rodis case involved the use of electro-shock therapy, as a result of which there was a fracture of one of the extremities. I think it was an arm. But in ruling out the question of res ipsa loquitur in that case -- which was not, incidentally, a general anesthetic proposition. The patient was fully aware of what was going on when the electric impulse was put to him. He was not peculiarly in the control of the doctor. Judge Edgerton said there, in discussing res ipsa loquitur, he blanketed it right in with the warranty theory. He said:

Doubtless a physician's statement that he would cure a disease could seldom if ever be regarded as a warranty. But that is not this case. The statement attributed to the defendant, that shock treatments are "perfectly safe," contains less of prediction and more of present fact.

227 I don't think the denial of res ipsa loquitur in the case is anywhere analogous to the case where the defendant is completely in the custody of the doctor. She knows nothing as to what he is doing. She specifically asked, in view of the prior history and she knew the torment and inconvenience that caused, that if there was any possibility of fracture, I think her testimony was she would have got up and walked out of the chair. The dentist in this case said it was perfectly safe, I will not fracture your jaw. I think his last concluding remark was if he knew he was going to do it he wouldn't have undertaken the case. The defendant didn't know whether he gave a double dose of sodium pentothal. I think he said the second dose may have been nitro-oxygen. She was completely in the dentist's case.

I think on the question of negligence it calls forth from the defendant now an explanation. He himself said as an adverse witness he didn't know what caused it. He gave two possibilities: first a convulsive reaction and, secondly, a muscular contraction.

I respectfully submit on the issue of negligence we are entitled to go to the jury on the inference from what is now in the case and also on the doctrine of res ipsa loquitur.

THE COURT: Anything further, Mr. Welch?

MR. WELCH: Nothing on those points, no, sir.

THE COURT: The Court has been studying this question in

228 anticipation of this motion for the last forty-eight hours. The Court's research goes back to cases as early as 1912 or 1913 on questions of this type of injury. I believe upon the basis of the reported cases, and especially the cases in the District of Columbia, that the Court is

required to grant the defendant's motion for a directed verdict on the grounds of negligence and res ipsa loquitur. The Court will grant the motion.

* * * * *

237 MR. WELCH: I wanted to ask Your Honor this: Because of the perspective of this case, the jury may wonder, when we examine these witnesses, why we confine ourselves solely to one phase or issue of the case, and it occurs to me it might be wise to let the jury understand what has happened, why this is at this time.

THE COURT: You have any views on this matter?

MR. DAVIS: I think the explanation should come just before submission of the case to the jury, because we may on cross-examination go into other matters. We don't know what Mr. Welch intends to elicit from Mrs. McMullin or his other witnesses. I don't think we should be restricted on cross-examination to the one issue.

THE COURT: The issue before the jury is, of course, the issue of warranty.

MR. DAVIS: That is correct.

THE COURT: I think if the Court is confronted with questions on examination that go to other issues in the case, I would be required,

238 if an objection was made, to sustain the objection. I will advise the jury briefly what the Court has done.

(End of the bench conference:)

THE COURT: Ladies and gentlemen of the jury: I think it may help your understanding the proceedings in this case if I advise you briefly what happened while you were out of the courtroom.

Upon termination of the Plaintiff's evidence, Mr. Welch, in behalf of the defendant, moved for a directed verdict in behalf of the defendant on the issues of negligence and res ipsa loquitur. The Court, upon the basis of its understanding of the law in this jurisdiction, granted this motion; so that there is eliminated from your consideration of the case any question of whether there was or was not negligence

on the part of this defendant or as to whether the doctrine of res ipsa loquitur, which is fundamentally a doctrine of implied negligence, is involved in the case.

The Court has ruled that the case must be considered from this point on upon the question of whether there was a warranty which was breached by this defendant. In due course the Court will define "warranty" to you and will explain the requirements of the law upon this point. But the proceedings from this point on, and the evidence, will relate to the issue of a warranty existing between the plaintiff and the defendant.

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239 SYBIL BURNETTE McMULLIN

called as a witness by the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q. Mrs. McMullin, will you please state your name in full.

A. Sybil Burnette McMullin.

* * * * *

Q. And in what work are you involved? A. A dental assistant there. I am a dental assistant.

* * * * *

240 Q. Did there come a time when you were employed by Doctor Keaveny? A. Yes, sir. March 12 of '57 I became employed with Doctor Keaveny.

Q. How long did you work with him? A. Well, I would say about five and a half years.

Q. You were there with him then in July 1958 when the plaintiff in this case, Mrs. Brown, was a patient? A. I was.

Q. You recognize Mrs. Brown as the person referred to?

A. Yes, I do.

Q. Were you in the office on July 1, 1958, the day Mrs. Brown came into Doctor Keaveny's office for treatment? A. Yes, sir; I was right there.

Q. Where in the office did you first see her? A. Well, Mrs. McCormack was sitting at the desk. She took her name and information. I was standing -- They had a little ledge alongside like this, and I was standing there, in a hallway-like. A little hallway.

Q. That was your first identification of Mrs. Brown? A. Yes, sir. She appeared at the window that we had there.

Q. Then did there come a time when she was taken to one
241 of the operating rooms for attention by the doctor? A. Yes, sir; I would say was around eleven o'clock.

Q. Now, were you in the room with the doctor and Mrs. Brown from that time until the operative procedures were concluded? A. Yes, sir; I was.

Q. Were you there when X-ray pictures were taken by Doctor Keaveny? A. Yes, sir.

Q. Were you there when the X-ray picture was returned to Doctor Keaveny to study and examine? A. Yes, sir; I was.

Q. Who took the X-ray picture out of the room to develop it? A. Mrs. McCormack.

Q. Did you hear any conversation between Mrs. Brown and Doctor Keaveny after the X-ray picture was examined by Doctor Keaveny? A. Yes, I did.

Q. What did you hear said? A. After Doctor Keaveny thoroughly examined the X-ray, he looked at Mrs. Brown and told her that it was a difficult extraction and it could be a possibility of a fracture.

Q. What, if anything, did Mrs. Brown reply? A. She said I hope not, because previously I have had a fracture on the opposite side;
242 the left side.

Q. You recall anything else in the way of conversation between Mrs. Brown and Doctor Keaveny with respect to the type of extraction, the difficulty of the extraction and the possibility of fracture?
A. Well, I would say not really. I don't remember just what else was said.

* * * * *

243 DIRECT EXAMINATION

BY MR. WELCH:

Q. Mrs. McMullin, were you present when Doctor Keaveny made an examination of Mrs. Brown's jaw after the impacted teeth were extracted? A. Yes, sir, I was.

Q. Where were you positioned in the room with respect to the patient at that time? A. I always stand behind the patient's head,
244 directly behind the patient, holding their head in perfect position.

Q. After whatever discussion there may have been with reference to fracture and after any X-ray pictures may have been taken, and I want you to skip that but directly concern yourself with my question. After the conclusion of the postoperative examination of Mrs. Brown, did Doctor Keaveny make any telephone calls that you personally know of? A. No, sir.

Q. I beg your pardon? A. No, sir. Not that -- I might misunderstand you.

Q. Were any telephone calls made by Doctor Keaveny with respect to Mrs. Brown's condition? A. Oh, yes. Doctor Hurley was called and also Doctor Dick.

Q. Who actually called Doctor Dick? A. Doctor Keaveny. Mrs. McCormack looked up the number for him and Doctor Keaveny placed the call.

Q. Did you remain in the offices until eventually Mrs. Brown left the office? A. No; I did not. It was around, I would say, 2:30 when I left.

Q. Mrs. Brown was still there? A. Yes, sir.

Q. Can you tell the Court and jury whether up to the time you
245 left Doctor Keaveny had made one or more than the one telephone call to try to reach Doctor Dick? A. Well, one or more would not even answer the question. He continuously called, trying to get in touch with him.

* * * * *

CROSS EXAMINATION

BY MR. DAVIS:

* * * * *

246 Q. Mrs. McMullin, I believe you have described yourself as a dental assistant? A. Yes, sir.

Q. You had any particular training in being a dental assistant?
247 A. I went to school at the National Institute of Public Nurses, for private nurses. I worked with doctors. But I have no education so far as dental assistant, if you want to put it that way.

Q. You are not a registered nurse, are you? A. No, sir, I am not.

Q. You are what is known as practical? A. Yes, sir.

Q. Such experience as you have had then in being a dental assistant you have picked up from working with dentists?

* * * * *

Q. Mrs. McMullin, I believe you said you were in Doctor Keaveny's office on July 1, 1958 when Mrs. Brown, a new patient, came in? A. Yes, sir, I was.

Q. You know who referred her to Doctor Keaveny?
A. Doctor Hurley.

Q. Did she have anything with her at the time she came in from Doctor Hurley? A. Not to my remembrance.

248 Q. She have any X-rays that Doctor Hurley had made?
A. Mrs. McCormack took her information and everything. I really don't know that.

* * * * *

Q. You don't know whether Mrs. Brown gave Mrs. McCormack any X-rays taken by Doctor Hurley? A. I do not know that.

Q. Who was it, as between you and Mrs. McCormack, eventually escorted Mrs. Brown into the dental chair in one of the operating rooms? A. I am not positive of that either.

Q. You don't recall whether it was yourself or Mrs. McCormack? A. I am not positive.

Q. What time of the day was it when Mrs. Brown presented herself at Doctor Keaveny's office that day? A. Well, we were busy that morning. We were running late. I am not really sure what time she appeared then.

249 Q. You recall the date or the time of her appointment? A. No, I am not sure.

Q. Would you say it was as early as 10:00 a.m.? A. It could have been. I am not sure.

Q. You recall how many other patients were in Doctor Keaveny's office that morning between 10:00 and 11:00 a.m.? A. No, I do not.

* * * * *

Q. Were you with Doctor Keaveny and Mrs. Brown during the entire time she was in his office that day? A. I was.

250 Q. Presurgery, I am talking about now. A. I was right there. Yes, sir. We always stand by the doctor, from the time the patient enters the room.

Q. Have you told us all of the conversation now that was had between Doctor Keaveny and Mrs. Brown? A. So far as I remember, yes.

Q. When did this conversation start? A. After we had taken the X-ray and Doctor Keaveny studied the X-ray. Then he told her what there was a possibility of having.

Q. You were not holding Mrs. Brown's jaw at that time, were you? A. No, sir.

Q. She was under no anesthesia at that time? A. No, sir.

Q. She was sitting in the dental chair? A. She was sitting in the dental chair, yes, sir.

Q. She was perfectly conscious of her surroundings?
A. Perfectly conscious.

Q. You were in the room also? A. Yes, sir.

Q. When the X-ray was brought back into the room by Mrs. McCormack, I believe you said? A. Yes, sir.

251 Q. You recall whether it was an individual negative or a series of X-rays? A. I am not sure.

Q. Were they mounted? A. I am not sure of that either.

MR. DAVIS: May I see Plaintiff's Exhibit 1, please.

Q. Are you able to tell us whether the X-rays taken by Doctor Keaveny were mounted in this form, or just simply one X-ray?
A. It was not mounted.

Q. Was there one or more than one? A. It was more than one. We took a postoperative on her after we did our work; before I left.

Q. I am not talking about postoperative. I am talking about the preoperative X-rays. How many did Doctor Keaveny take?
A. I am not sure.

Q. He did take more than one? A. I am sure he did.

Q. Now, during the discussion about these X-rays taken by Doctor Keaveny, will you state to the Court and the jury whether or not Doctor Keaveny inserted these X-rays in what is known as a view-box, with a light behind it? A. I don't know what you mean.

Q. You are familiar with dental X-rays, are you not? A. Yes.

252 But I don't know just what you mean.

Q. You know, you have a lighted view box, similar to the one --
A. He has a magnifying glass he uses.

Q. Did he look at these X-rays through a magnifying glass?
A. Yes, sir.

Q. Did he hold them up to the window? A. Yes, sir.

Q. Did he call Mrs. Brown out of the dental chair to come over and look out the window through the negatives with him while at the window? A. I am not really positive about that.

Q. What was it that Doctor Keaveny said exactly that he saw in these X-rays? A. I couldn't exactly say the actual words he said.

Q. Did you look at the X-rays? A. Yes, I did.

Q. What did you see in the X-rays? A. Well, I saw a very badly impacted tooth. Her second molar was imbedded in the bone. And her first molar covered that.

Q. In other words, one molar on top of the other? A. Yes, sir.

Q. The top molar was not imbedded in the jaw, was it?

253 A. Sir?

Q. Was the top molar imbedded in the jaw? A. It would have to be some. But not like the bottom. The bottom was completely imbedded. But the top was not all the way, I would say.

Q. Did Dictor Keaveny make any statement about the seriousness of that condition? A. He certainly did.

Q. What did he say? A. He told her that it was a very bad extraction and there would be a possibility of a fractured jaw but he would do everything in his power not to have that happen.

Q. What was Mrs. Brown's response to that statement?

A. She said, "I hope not, because previously I have had a broken jaw on the opposite side."

Q. Did you hear her specifically ask Doctor Keaveny, "You are going to break my jaw, are you?" A. No. She never said that.

Q. She never said that? A. No, sir.

Q. Was that the full extent of the conversation? A. Yes, sir; so far as I know, or that I can remember fully.

Q. In preparation of Mrs. Brown for this extraction, was she given any anesthesia? A. In preparation -- what do you mean? Before

254 we started to extract the tooth?

Q. Yes. A. Yes, sir. She was given sodium pentothal.

Q. Who actually administered the sodium pentothal?

A. Doctor Keaveny.

Q. Of course that put her completely out, did it not?

A. Yes, sir.

Q. She was absolutely unaware of what was going on after that? A. I would certainly say so.

Q. You recall what time this surgical procedure commenced that day? A. I am not sure.

Q. You can't tell us whether it was 11:00, 11:30? A. She was brought into our office around 11:00. It takes a while to take an X-ray and discuss with the patient what happens, what could happen. It takes a little while. So I couldn't say exactly what time we started.

Q. Did Doctor Keaveny eventually remove these two impacted molars? A. Yes, sir.

Q. How long did the overall procedure take? A. I am not really sure. It was quite a while but I am not really sure.

255 Q. Give us your best estimate. A. Sir?

Q. Give us your best estimate of the overall length of time consumed in the operation. A. I would say an hour and a half, roughly. I wouldn't say positive on that.

Q. During that entire hour and a half was Mrs. Brown completely out as the result of the first shot of sodium pentothal? A. Yes, sir. I would say -- once in a while they will move their hands a little bit. But I would say she was down, where she should be.

Q. Was it ever necessary during that hour and a half to administer a second shot of anesthesia? A. I was too busy doing what I was supposed to be to even know.

Q. You were busy holding her jaw? A. Yes, sir.

* * * * *

Q. You don't know one way or the other whether a second shot

256 of anesthesia was administered? A. I am not positive.

Q. Did there come a time when Doctor Keaveny finally finished the procedure? A. Yes, sir.

Q. And did you observe what he did after finishing the procedure? A. He was washing his hands at the sink and I was still -- you have to be very particular with a patient, and always be sure that their head is kept in the proper position. And I, in holding her head,

I said to doctor, I said, "I believe something is wrong." As soon as he finished he come right back to her. He looked in her mouth. He said, "I think you are right."

Q. Will you speak a little louder. A. I said he was washing his hands after we finished. And while I was holding her head I could feel a little movement, as I thought. I wasn't positive. And so I told him, I says, "Doctor, I believe something is wrong." And so just as soon as he driedhis hands he came back and looked, and examined her fully, and he said, "I think you are right."

Q. Before Doctor Keaveny went to wash his hands, after the completion of the operation, did he make any statement to either you or Mrs. McCormack? A. No, sir; not to my remembrance.

257 Q. Did you hear him say, "Well, thank goodness, that has been done without breaking her jaw"? A. No, sir. He didn't say that; no, sir.

Q. You are sure of that? A. Yes, sir. I did not hear it.

Q. If he did say it, you would have heard him? A. Yes, sir; I would think so.

Q. After he went to wash his hands, you are still holding her jaw and you feel some movement? A. Yes. I hold their head until we put them in the rest room.

Q. She was still under the effects of the anesthesia then? A. Yes, sir.

Q. Describe the movement you say you felt. A. Well, you could just tell, because her jawbone was tissue-thin to begin with. It was real thin..

Q. Was her jaw moving? A. It was a little movement, I thought I could feel, and that is why I called him.

Q. You mean it was opening and closing? A. No.

Q. What kind of movement was it? A. In holding her head I could feel a little movement in it, as I thought there shouldn't be.

* * * * *

259 Q. Was any portion of Mrs. Brown's jaw sticking through the flesh, Mrs. McMullin? A. No, sir.

Q. Isn't it a fact that what you felt was a difference in the contour of the jaw, from what it was before the operation to what it was after the operation? A. I couldn't explain exactly what I felt. I just felt like it was something wrong. But I didn't know. I am not experienced on that.

Q. Did you hold her jaw during the entire procedure? A. I always do, yes, sir.

Q. What was the occasion for your holding her jaw after the
260 procedure was completed and the doctor was washing his hands? A. You still have to do that, until the patient is fully awake. You always have to be sure that their head is kept in the proper position.

Q. While you were holding her jaw after the operation was over, Doctor Keaveny was washing his hands, did you feel any twitching of her muscles? A. I couldn't say that.

Q. Did you or didn't you? A. I said I couldn't say whether I did or not. I am not sure.

* * * * *

Q. You say you did hear Mrs. Brown tell Doctor Keaveny that she had a prior jaw fracture on the left side? A. Yes, sir.

Q. Did she tell Doctor Keaveny when that occurred? A. No, sir; she did not. I am not positive now. I will take that back. I am not positive whether she did or not.

Q. You don't know whether she told him about the prior fracture?
261 A. When it occurred. She told him she had had a prior fracture, but I am not sure whether she said when it occurred or not.

* * * * *

262 Q. Were you present when these particular phone calls were made? A. Yes, sir. I was in the office.

Q. Did you make them on behalf of Doctor Keaveny, or Mrs. McCormack? A. Mrs. McCormack looked up the number. Doctor

263 Keaveny called Doctor Hurley. Mrs. McCormack looked up the number for him to call Doctor Dick and he personally did that himself, continuously trying to reach him.

Q. Can you fix the time the first call was made to the office of Doctor Dick? A. No, sir, I cannot.

Q. Can you fix the length of time after the completion of the operation? A. I am not sure on the time.

Q. I understand you to say that you left the office for the day at 2:30 p.m.? A. Yes, sir. At that time --

THE COURT: Just answer the question.

A. Yes, sir.

BY MR. DAVIS:

Q. And you didn't come back any more that day? A. No, sir.

Q. So you were not there when Mr. Brown, the patient's husband, came in? A. No, sir.

* * * * *

265 Q. You know what was Doctor Keaveny's purpose in calling Doctor Hurley after the operation? A. His purpose for calling Doctor Hurley was to try to find out how we could get in touch with Mrs. Brown's husband.

Q. It wasn't for the purpose of rendering any dental assistance, was it? A. No, sir.

Q. And what was his purpose in calling or trying to call Dr. Arthur Dick that afternoon? A. He called Doctor Dick because he

266 thought that there was something that should be looked into by someone that was more experienced in a break than he was.

Q. Before the operation, while Mrs. Brown was discussing this matter of a fractured jaw with Doctor Keaveny, didn't she mention that Doctor Dick had treated her for the fractured jaw of 1956? A. I don't remember that.

Q. Did you hear Doctor Dick's name mentioned at all before Mrs. McCormack attempted to get him on the telephone after the operation? A. I am not sure.

* * * * *

MONICA M. McCORMACK

called as a witness by the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

* * * * *

267 Q. * * * Please state your name in full for the record.

A. Monica M. McCormack.

* * * * *

Q. What is your age? A. Twenty-two.

Q. Are you presently employed? A. No, I am not.

Q. Was there a time when you worked for the defendant in this case, Doctor Keaveny? A. Yes, there was.

Q. When did you go to work for Doctor Keaveny, if you recall? A. September '57, I think.

Q. And how long did you continue to work for him?

A. Approximately eighteen months to two years.

* * * * *

268 Q. What was the nature of your employment at Doctor Keaveny's office? A. Receptionist and assistant.

Q. Did there come a time, July 1, 1958, when you had occasion to meet and see the plaintiff in this case, Mrs. Brown? A. Yes, there was.

Q. And where did you first see her, Mrs. McCormack? A. In Doctor Keaveny's office.

Q. Do you remember about what time of day it was that she came into the office? A. She came in, I would say, approximately around 10:00 a.m.

Q. And do you have any recollection of about what time of day she was taken or ushered from the reception room to one of the operating rooms? A. I would say between 11:00 and 11:15.

Q. Can you tell me who took her back in the operation room, you or Mrs. McMullin, if you recall? A. I really don't know which one of us took her back.

Q. After she was taken to the operating room, were you present from that time on so as to be familiar with what transpired in that
269 room? A. Yes, I was.

Q. After Mrs. Brown was first taken into the room, what happened with respect to examining her and so forth? A. Well, of course Doctor Keaveny made the clinical examination. He read the X-rays that Doctor Hurley had sent, if I am correct, he did send them. He also took X-rays of his own.

Q. You know where Doctor Keaveny's own X-ray film was developed? A. Do I know where it was developed?

Q. Yes. A. Yes. In the office.

Q. And do you remember now who took it to develop it? A. I think it was Mrs. McMullin. I am not sure. I couldn't really recall which it was.

Q. After it was developed did you see the X-ray picture? A. Yes, I saw them.

Q. Where were you when you saw them? A. Standing in the room with Doctor Keaveny and Mrs. McMullin.

Q. Was Mrs. Brown also in that same room? A. She was.

Q. And what did Doctor Keaveny do with the X-ray film? A. Well, of course he examined them with the light and through the
270 window.

Q. Do you remember whether there was one or more than one film that Doctor Keaveny himself made? A. I really don't remember whether there was more than one or not, before the operation.

Q. What did you see Doctor Keaveny do in any event with the film that he had taken with respect to Mrs. Brown's jaw? A. I am not sure I understand your question.

Q. What did he do with it after it was brought back into -- A. Of course he examined it, like I say, with the light and with the window.

Q. When you say against the light, are you suggesting a light other than the window light? A. Yes. He has a small light on the side of the room.

Q. That would be a view-box, we call it? A. Right.

Q. Is that right? A. That is right.

Q. Doctor Keaveny used both the view-box and the window light? A. Yes.

Q. Do you recall whether he used a glass, a magnifying glass also? A. Well, I couldn't really recall if he did or not. But most of the
271 time he does.

* * * * *

Q. After examining the X-ray film, did you hear any conversation between Doctor Keaveny and Mrs. Brown? A. Yes, I did.

Q. As best you can recall, will you tell the Court and the jury what conversation you heard. A. Well, of course he explained to Mrs. Brown that it was a rather difficult operation, and he also told her there was a possibility of her jaw being broken; he would try not to do this but he would not guarantee it.

Q. What, if anything, did you hear her say? A. And her reply to this was: I hope not because I just had the other side broken approximately a year ago.

Q. Was anything more said about how her previous jaw fracture or break had occurred? A. No.

Q. You recall her saying anything about who took care of that fracture for her? A. No, I don't recall.

272 Q. Did you remain continuously in the room until she was anesthetized and the extractions were completed? A. Yes, I did.

Q. Were you in the room at the time Doctor Keaveny did complete the extractions? A. Yes, I was.

Q. After he had finished his work on the extractions, what did he do and what happened, if you recall? A. Well, as I recall, he went over to scrub up and Mrs. McMullin of course was standing directly

behind the patient, holding her chin, and she turns around and looks at Doctor Keaveny and says, "I think there is something wrong here."

Q. Where were you standing at that time? A. On the other side of the chair.

Q. Would that be to the patient's left or right? A. That would be to the patient's left.

Q. And after Mrs. McMullin made such remark to Doctor Keaveny, what did he do? A. Of course he immediately came back into the room to check, to see if there was something wrong.

Q. And then what happened so far as you can recall?
A. Well, of course at that time is when we discovered that her jaw had been fractured.

Q. Then what if anything was done? A. A postoperative X-ray
273 was taken to prove our theory.

Q. Then after the postoperative X-ray was taken to confirm the presence of the fracture, what was done with the patient?
A. Well, she was returnedto the rest room.

Q. After she was returned to the rest room, do you recall whether Doctor Keaveny made any telephone calls? A. Yes, he did. He immediately went to the phone and called Doctor Hurley.

Q. And then did he make any other telephone call after he talked with Doctor Hurley? A. Yes, he did. He called to get in touch with Mrs. Brown's husband.

Q. And then after that did he make any other phone calls that you know of? A. Yes, he did. He called Dr. Arthur Dick.

Q. Did you continue in the office until Mrs. Brown left the office that afternoon? A. Yes, I did.

Q. And you were there when Mr. Brown came to the office, were you? A. Yes.

Q. To your knowledge, at any time that afternoon before Mrs. Brown left the office, had there been any telephone communication
274 from Doctor Dick? A. We had been unable to locate him. We had called several times.

Q. Had he contacted your office before Mrs. Brown left the office that afternoon? A. Yes; as I recall, he had.

Q. And who talked with him when he called? A. Doctor Keaveny talked with Doctor Dick.

Q. When Mr. Brown came in the office, where were you? A. I was in the hallway between the sterilizing room and the rest room.

Q. You remember about what time Mr. Brown came in the office? A. Approximately, I would say between maybe 3:00 and 3:15. Somewhere in that vicinity.

Q. Did there come a time when any other doctor came into the office that afternoon? A. Yes.

Q. Who was that? A. That was Doctor Greenfield.

Q. Did there come a time that afternoon when Mrs. Brown was taken to the room again for X-ray pictures? A. Yes.

Q. Who took her to the room for final X-ray pictures? A. I did, with the help of Mr. Brown.

275 Q. What happened in the X-ray room? A. Well, she was immediately placed in the chair for the X-ray and it was taken.

Q. Who took the X-ray? A. Doctor Keaveny.

Q. Did you at any time touch the X-ray equipment? A. I did not touch the nozzle or anything like that. The only thing that I did was to push the button to take it.

Q. At any time during that procedure, did any part of the X-ray equipment hit Mrs. Brown in the face? A. I do not think so, no.

Q. Don't you know whether it did or didn't? A. No; I really don't. Because I don't remember any such thing happening.

Q. You were there all the time? A. Yes.

Q. Anything occur to Mrs. Brown while that X-ray was being taken to cause her to scream? A. No.

Q. Were you there when Mrs. Brown left the office? A. Yes, I was.

Q. And who did she leave the office with? A. With Mr. Brown and myself.

Q. You helped her to leave the office? A. Yes, I did.

* * * * *

277 CROSS EXAMINATION

BY MR. DAVIS:

* * * * *

281 Q. When was it the conversation, the brief conversation you have detailed, commenced? Was it before or after the taking of the X-rays? A. Well, of course when he examined the X-rays he told her that this was a very difficult operation. And that was after the X-rays were taken.

Q. Did he tell her anything about the possibility of breaking her jaw if he attempted to take it out? A. Yes, he did.

Q. What was her response to that? A. I hope not; because about a year ago the other side was fractured.

* * * * *

283 Q. You recall how long this surgical procedure to extract this impacted tooth took? A. Oh, I would say maybe forty-five minutes to an hour. I couldn't really say.

Q. Not over an hour? A. No, I wouldn't think so.

Q. Were you present during the entire procedure? A. Yes, I was.

Q. Had you ever witnessed any other such extraction of an impacted molar? A. No.

Q. This was your first occasion to see such a procedure? A. One that was this imbedded, yes, and difficult.

* * * * *

286 Q. In that ten months before this particular patient's extraction of this impacted molar, had you ever had occasion to observe another such occurrence, that is, removal of an impacted molar? A. Not one like Mrs. Fisher's, no.

* * * * *

291 Q. Did I understand you to say that at that time, after she had been taken to the rest room or recovery room, that Doctor Keaveny himself then went directly to the phone? A. Yes; that is correct.

Q. He didn't delegate that duty to you or Mrs. McMullin? A. No, he did not.

Q. He made a call first to Doctor Hurley? A. That is correct.

Q. Did he get Doctor Hurley? A. Yes, he did.

* * * * *

Q. What was the substance of his conversation with Doctor Hurley? A. Well, he was calling to get in contact with someone, for Mrs. Brown, her husband or someone.

292 Q. Did you overhear him tell Doctor Hurley that the patient had just sustained a fracture of the jaw as a result of this procedure? A. That I heard, yes, but not the rest of the conversation.

* * * * *

Q. After talking to Doctor Hurley, I believe you said that Doctor Keaveny then made another telephone call in an attempt to contact Mr. Brown? A. That is correct.

Q. Was he successful in contacting Mr. Brown? A. Not at

293 that time, no.

Q. And did you then hear him actually dial the phone to contact Doctor Dick? A. Yes, I did.

Q. You have any idea why he called Doctor Dick at that time? A. Why he called him at that time?

Q. Yes. A. To have someone look after Mrs. Brown, because there was a fracture.

* * * * *

294 Q. Mrs. McCormack, you recall who first mentioned the name of Doctor Dick any time that day while Mrs. Brown was in Doctor Keaveny's office? A. Doctor Keaveny himself. That I recall.

Q. You hadn't heard any reference made to Doctor Dick by Mrs. Brown? A. No, I had not.

* * * * *

295 Q. Did I understand you to say that Doctor Dick did eventually contact Doctor Keaveny? A. Yes.

Q. Was that the same day? A. Yes, it was.

Q. Was that in person or by telephone? A. By telephone.

Q. You know about what time that was? A. I would say about three-thirty.

* * * * *

Q. When the husband came in did he have any conversation with Doctor Keaveny? A. Yes, he did.

* * * * *

296 Q. Did Doctor Keaveny tell Mr. Brown at that time that he had attempted to contact Doctor Dick without success? A. Yes, he did.

* * * * *

300 Q. During the course of doing that did any part of the nozzle, as you call it, or any part of the X-ray machine strike the patient's jaw before the X-ray was taken? A. Not that I recall; no.

Q. On that occasion did you hear Mrs. Brown let out an outcry? A. No, I didn't.

Q. You heard no such outcry? A. No, I didn't.

* * * * *

305 JOHN F. KEAVENY

recalled as a witness in his own behalf and, having been previously sworn, was examined and further testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q. Doctor Keaveny, you informed me that you wish to make a modification or correction in your testimony in the statement to the Court. Will you please proceed. A. I wish to modify a statement, an
306 answer I gave to a question by Mr. Mendelsohn in reference to a second postoperative X-ray picture. I was dubious at the time that

a second picture had been taken. After leaving the courtroom, and thinking this question and answer over, I talked to Mrs. McCormack and asked her if we did take a second postoperative picture, and she said that we did. And of course I wish to abide by the opinion of Mrs. McCormack in that matter.

* * * * *

Q. Did she point out to you something that did serve to refresh your recollection about it? A. Well, she said that I had made the remark that I wish to have another picture taken because I was not completely satisfied with the first picture that had been taken.

307 Q. You say that did refresh your recollection? A. Yes, it did.

* * * * *

328 Washington, D. C.
Wednesday, October, 3, 1962

* * * * *

330 THE COURT:

* * * * *

Secondly, the Court received on Monday by mail a letter from Mr. Welch in which he submitted a proposed defendant's instruction which I will number 1. I assume that counsel for the plaintiff has received a copy of this instruction. Have you, Mr. Davis?

MR. DAVIS: Yes, Your Honor. I received it by messenger Friday afternoon.

THE COURT: Do you have any objection to this requested instruction?

MR. DAVIS: As drawn, I do, Your Honor, because it might be a proper instruction in a tort action for deceit; it is certainly not applicable to an action, as the case now stands, for breach of warranty.

* * * * *

337 THE COURT: The Court will grant the defendant's requested instruction No. 1 in substance.

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338 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

BY MR. MENDELSOHN

MR. MENDELSOHN:

* * * * *

344 Now, it doesn't make any difference, ladies and gentlemen, whether he used better care than any other doctor in the District of Columbia would have used in extracting that tooth. That doesn't make any difference in this case. He could be very careful and use extreme care in taking that tooth out, but that isn't the question. The question is did he breach a warranty? Did he break her jaw after he said, "No, I will not break your jaw"? That is the only question involved in this case; not whether he used a lot of care or was careful. That doesn't make any difference in this case. And when she asked, "Doctor, are you going to break my jaw?", she expected a frank answer.

* * * * *

353 [MR. MENDELSOHN:] Well, if she was never unconscious, ladies and gentlemen, can you imagine the pain and suffering that she was suffering during those four hours that she was in his office? Did they give her any medical attention while she was there for four hours? Dr.

354 Keaveny called up Dr. Dick and Dr. Dick wasn't in his office. He may have called him twice, he may have called him three times, I don't know, but he thought he did his duty when he called up Dr. Dick and Dr. Dick wasn't there.

Did he call any other doctor in the District of Columbia while this woman was in the back room for four hours and in that awful pain with a broken jaw and with her gums all chiseled away with a chisel in her mouth? Did he call another medical doctor with the thousands of doctors that we have in the District of Columbia? Did he call any doctor that was in this medical building? There were two doctors in this medical building and he didn't even call the doctors in this medical

building to come up and give this woman some relief when she was in the back room there for four hours. He thought he had done his duty when he called Dr. Dick and he didn't even contact Dr. Dick. He wasn't in his office. What if Dr. Dick happened to be in New York at the time, would he wait for Dr. Dick to come back in town before this woman got any medical attention at all? She was lying there in that back room for four hours. What were they doing for four hours? He had no more patients that day. She was the last patient that he had that day. That is

355 what they all testified to.

For four hours, what were they doing while this woman was lying in that back room suffering? Well, you can bet your life that Dr. Keaveny went out and had himself a fat lunch and you can bet your life his attendants went out and had themselves a fat lunch and left that woman in the back room there with no attention.

* * * * *

356 Although this was four o'clock in the afternoon, a little after four, and Dr. Keaveny had no other patients in the office at all, he left the responsibility with Mr. Brown to take his own wife to the hospital. After he was the one who performed the operation and broke her jaw, he didn't even go to the hospital for the ride.

* * * * *

361 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

BY MR. WELCH

MR. WELCH:

* * * * *

362 To begin with, I would like to try to put this case in its proper perspective. The defendant Dr. Keaveny would not be in court, nor would his counsel be here if we felt at all in good conscience that we had made a warranty to Mrs. Brown guaranteeing to her that she would not sustain a fracture as a result of the extraction of these most difficult impacted teeth.

We knew before this morning arrived, we started out being charged with negligence in the extraction of these impacted teeth, being charged with having done it carelessly and negligently and unskillfully.

We started out with another charge that this was the simple sort of an extraction problem where a fracture could not result unless somebody was negligent.

We started out with the third charge that we had guaranteed that no fracture would result or ensue from the extraction of these impacted teeth.

So, I am not surprised to find ourselves here this morning listening to a very urgent argument on the part of plaintiff's counsel to award
363 large damages for his client. We knew when we came in court that the plaintiff in this case couldn't possibly prove one single word to support the charges that Dr. Keaveny was negligent and unskillful; that he was careless or indifferent in doing these extractions.

It is very simple and very easy to determine every step in his procedure, and to have learned from many sources in the profession in the District of Columbia whether Dr. Keaveny exercised great skill and care in doing this work or whether he did not do the work in keeping with the standards of practice that would be required of a specialist.

MR. DAVIS: If Your Honor please, I must respectfully interrupt counsel. Since the issue of negligence is out of the case, I think this is a highly improper argument. I object.

THE COURT: The objection is overruled.

* * * * *

377 ]MR. WELCH:] There isn't any question but what, as humans, we all are inclined to have sympathy for people who suffer and who have distresses and who have unfortunate results from medical treatment and surgical operations. We are not here decrying and we have not at any time attempted to decry the fact that Mrs. Brown has had a good deal of suffering and a good deal of distress and if we had felt at any time that we were responsible for it because of negligence or responsible for it because we made a guarantee for it, we wouldn't be here today.

We come before the jury because we feel that we did not make any warranty and we were not guilty of any negligence and we feel that the evidence has satisfactorily shown that.

* * * * *

378 REBUTTAL ARGUMENT ON BEHALF OF THE PLAINTIFF

BY MR. DAVIS

MR. DAVIS:

* * * * *

385 Now, I think Mr. Welch made one very low blow in his argument when he starts to argue to you on the point that I objected to, but the Court overruled me on it. When this case started out, it started out with three counts: one in negligence, one in res ipsa loquitur and one in the present posture, breach of contract.

Now, what did Mr. Welch tell you on that point? The negligence count, of course, is out by direction of the Court. Mr. Welch's words -- I will read them so I make sure I don't commit error in quoting him -- he says, "We knew the plaintiff couldn't prove a single word as to

386 negligence." What made him so positive as to assurance? Ladies and gentlemen, do you think this good lady could have gotten any dentist in the District --

THE COURT: Just a minute. This is not proper argument.

* * * * *

388 CHARGE TO THE JURY

THE COURT:

* * * * *

392 Now then, to go specifically to the question involved in this case, as counsel and I believe the Court have explained to you, the Court eliminated from this case the question of negligence. I emphasize the fact that there is no issue of negligence on the part of Doctor Keaveny in this case.

Why did the Court eliminate this question from the case? I want you to understand generally what the law is about the liability of a

physician or a dentist in order that you can properly understand the relatively narrow field which is before you for determination of the facts in this case:

A physician, a surgeon or a dentist is obligated to exercise the degree of care and skill that is ordinarily employed by members of the profession in the same line of practice in his own or similar locality. Failure to use care or skill constitutes negligence. On the other hand, a doctor or a dentist is not an insurer of health or a guarantor of results. He undertakes only to abide by the prevailing standards and to utilize the skill possessed generally by others practicing in his field and to accord the care that they would ordinarily extend in similar cir-

393 cumstances. He must have latitude for the exercise of reasonable judgment and is not liable for a mere error of his decision.

A patient who claims to have been injured by a doctor's or a dentist's negligence has the burden of proving by a preponderance of the evidence that the defendant departed from the applicable standards or was unskillful or negligent.

This being the requirement of law on the issue of negligence in this case, the Court concluded at the termination of the plaintiff's case that there was no competent evidence that showed any negligence in this case and, consequently, the Court ruled as a matter of law that the issue of negligence would not be submitted to you jurors.

* * * * *

402 THE COURT: I am asking you whether you request any further charge.

MR. DAVIS: I would like the Court to instruct the jury with reference to Mr. Welch's argument along these words, "We would not be in court if we felt the defendant had made a warranty", be disregarded by the jury as being a statement evidencing a settlement intention. Our cases in this jurisdiction have established this is improper, particularly in the D. C. Transit case.

Due to the limited time I had in closing, I had no opportunity to respond to that portion of Mr. Welch's argument.

THE COURT: The Court will deny the request because the Court has instructed the jury, first, that the closing arguments of counsel do not constitute evidence in the case; secondly, I understand the defense in this case is a denial of warranty. "We wouldn't be here if we believed the warranty existed," I think is a defense in the case.

* * * * *

403 MR. DAVIS: I respectfully note an objection to the Court's refusal to permit plaintiff's counsel to rebut defendant's argument relative to the negligence count, since the defendant opened that subject up in his argument and was not properly a proper argument in the present case. I object to the Court's comment and explanation to the jury as to why the negligence charge was eliminated from the case, that being a matter of law and not a matter of fact and being contrary to the plaintiff's requested instruction No. 4 that the jury could find a breach of warranty even though the highest degree of skill or care had been used.

THE COURT: Are you finished?

MR. DAVIS: Yes, Your Honor.

THE COURT: Your objections are a matter of record.

* * * * *

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[Filed Oct. 3, 1962]

PLAINTIFF'S INSTRUCTION NO. 1

The Court instructs the jury that a medical or dental "malpractice" suit does not imply criminal or unethical conduct by the defendant, or jeopardize his professional license, membership in professional societies, or status in the eyes of his colleagues.

The term "malpractice" is a legal term, and means simply "professional negligence".

The "negligence" in malpractice may be analogized to the negligence of a doctor (or dentist) in driving his automobile not in the course

of professional duty, and for which negligence he would be as much subjected to liability as any other motorist, his status as a doctor (or dentist) being merely incidental.

[Denied as Drawn.]

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[Filed Oct. 3, 1962]

PLAINTIFF'S INSTRUCTION NO. 4

The Court instructs the jury that if a doctor, or dentist, makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he use the highest possible professional skill.

SAFIAN V. AETNA LIFE INSURANCE CO., 260 AD 765, 24 NYS2d 92 (1940), affd. 286 N.Y. 649, 36 NE2d 692 (1941)

[Denied as Drawn.]

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[Filed Oct. 3, 1962]

PLAINTIFF'S INSTRUCTION NO. 7

The Court instructs the jury that a physician (or dentist) violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician (or dentist) may not minimize the known dangers of a procedure or operation in order to induce his patient's consent. At the same time, the physician (or dentist) must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure

or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.

SALGO V. LELAND STANFORD BOARD OF TRUSTEES, 154 Cal. App.2d 560, 578 , 317 P.2d 170 (1957)

[Denied as Drawn.]

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[Filed Oct. 3, 1962]

PLAINTIFF'S INSTRUCTION NO. 9

The Court instructs the jury that if you believe from the evidence, that the plaintiff, Mrs. Brown, was injured through ~~the negligence~~, ~~or~~ breach of WARRANTY ~~contract~~, of the defendant, Dr. Keaveny, and that at the time of the injury, the said plaintiff had a latent, or dormant, physical condition, known as acute anemia, or osteomyelitis, and that such injury aggravated, augmented, or accelerated such latent or dormant condition and the suffering occasioned thereby, as well as the disability resulting therefrom, then you may, if you find for the plaintiff, award her such damages as will reasonably compensate her for the aggravation of such pre-existing condition.

SENTILLES v. INTER-CARIBBEAN SHIPPING CORP., 80 S. Ct. 173 (1959)
WASHINGTON & O.D. RAILWAY CO. V. SMITH, 53 App. D.C. 184 (1923)

[Denied as Drawn.]

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[Filed Oct. 3, 1962]

## DEFENDANT'S INSTRUCTION

The jury is instructed that the only issue in this case is whether the defendant, Dr. Keaveny, warranted to the plaintiff, Mrs. Brown, that he would not fracture her jaw in performing extraction of her impacted teeth. In this connection you are further instructed, that in order to create such warranty as would permit the plaintiff to recover anything from the defendant in this case, three elements must be present: (1). The language used or alleged to have been used by the defendant must be clearly and unequivocally a positive assurance, that is, something more than words or statements to allay plaintiff's apprehension and anxiety. (2). The plaintiff must have accepted and solely relied upon such words or statements as to the hazards and dangers of extracting said teeth; (3). The plaintiff must have relied upon said words or statements, independently of other advice and information which she had, when she agreed to have the extractions performed by defendant. Therefore, unless you find from a preponderance of all of the evidence that all three of said elements were present, you must find that the warranty upon which plaintiff relies, did not exist and your verdict will be for the defendant.

## AUTHORITIES

D. C. Code, Title 28, ¶1112.

Johnston v. Rodis, 102 D.C. App., 209-10.

[Filed October 3, 1962]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 25th day of September, 1962, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between Grace Fisher Brown, plaintiff and John F. Keaveny, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 3rd day of October, 1962, that they find for the defendant against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense.

HARRY M. HULL, Clerk,

By /s/ Anne W. Lyddane
Deputy Clerk

By direction of
Judge Edward A. Tamm

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[Filed October 12, 1962]

MOTION FOR NEW TRIAL

Comes now the plaintiff, by and through counsel of record, and being aggrieved by the verdict of the jury herein, on Wednesday, October 3, 1962, respectfully moves this Honorable Court for a new trial thereof, and as reasons therefor, plaintiff states:

1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. The verdict was contrary to law.
4. The Court erred in directing a verdict for the defendant on Count One, at the end of the plaintiff's case.

5. The Court erred in dismissing Count One with prejudice.

6. The Court erred in denying the application of the doctrine of res ipsa loquitur to the facts of this case, since the plaintiff, being under general anesthesia at the time of sustaining her injury, could not know the cause thereof; whereas, the defendant, being in control of the situation, at least should have been called on to explain the absence of any negligence on his part.

7. The Court erred in denying plaintiff's requested instructions Nos. 1, 4, 7 and 9; and in granting the defendant's requested Instruction No. 1, in substance.

8. The Court erred in commenting to the jury and in explaining to the jury any reasons for having directed a verdict for the defendant on the negligence count, since such action in directing a verdict was done on the basis of law, not of fact; and such "explanation", not being a matter of concern to the jury as a question of law, could not have failed to influence the jury to the plaintiff's prejudice on the remaining count which was submitted to it for decision.

9. And for other reasons apparent from the record hereof.

Respectfully submitted,

/s/ Earl H. Davis,
of counsel for Plaintiff,
1815 H Street, N.W.
Wash. 6, D.C.
ST. 3-7110.

## AUTHORITIES

Christie v. Callahan, 75 App. D.C. 133, 124 F.2d 825, 827 (1941)

Ybarra v. Spangard, 25 Cal 2d 486, 154 P.2d 687, 162 ALR 1258 (1954)

Vergeldt v. Hartzell (1924, CA8 Minn.) - 1 F2d 633

Holt v. Nesbitt (1951) Ont. R 601 (1951) 4 DLR 478 (CA), affd. (1953) 1 Can SC 143, (1953) 1 DLR 671

Ambrosi v. Monks (1951) (M.C. App., D.C.) 85 A.2d 188

Bence v. Denbo (1932) 98 Ind. App. 52, 183 N.E. 326

Eicholz v. Poe (1920, Mo.), 217 S.W. 282

Wolfe v. Feldman (1936), 158 Misc. 656, 286 NYS 118

Griffin v. Norman (1922, Sup. App. T) 192 N.Y.S. 322

Zettler v. Reich (1939), 256 App Div 631, 11 NYS 2d 85, affd 281 NY 729, 23 NE 2d 548

[Certificate of Service]

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[Filed October 26, 1962]

ORDER OVERRULING MOTION FOR NEW TRIAL

Upon consideration of the motion filed hereby by the plaintiff, for a new trial, it is this 26th day of October, 1962, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, Clerk

By Anne W. Lyddane
Deputy Clerk

By direction of

Edward A. Tamm
Judge

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[Filed November 23, 1962]

NOTICE OF APPEAL

Notice is hereby given this 23rd day of November, 1962, that Grace Fisher Brown, plaintiff in the above entitled action hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26th day of October, 1962 in favor of defendant, John F. Keaveny, against plaintiff, Grace Fisher Brown, plaintiff.

DAVIS & MENDELSOHN,

By: /s/ Earl H. Davis
Attorney for Plaintiff-appellant

COUNSEL TO BE NOTIFIED:

H. Mason Welch, Esq.
% Welch, Daily & Welch
Attorneys for Defendant

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 17,490

GRACE FISHER BROWN,

*Appellant,*

v.

JOHN F. KEAVENY,

*Appellee.*

## APPELLANT'S PETITION FOR A REHEARING IN BANC

**To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:**

Comes now the appellant in the above-entitled case, and respectfully prays the Court to grant a rehearing of this appeal, in banc, and in support thereof appellant cites the following reasons and authorities:

This is a malpractice action, in which the trial court directed a verdict for the defendant-dentist at the close of plaintiff's case, on the issues of negligence and res ipsa loquitur.

A three-judge section of this Court heard the arguments on oral argument of this appeal, after which a two-judge majority, on December 12, 1963, affirmed the lower court; one judge, Hon. J. Skelly Wright, vigorously dissenting therefrom.

In the per curiam opinion of the majority, it is stated:

> "The plaintiff may not rest his case on the mere fact of his injury or rely upon the jury's untutored sympathies. * * * *"

This case involved a patient who was given a general anesthetic (sodium pentothal) for the removal of an impacted tooth. When she awoke from the anesthesia she had a compound fracture of the jaw, i.e. — the broken bone was showing through the tissue.

It is respectfully submitted that this case is the typical, or classical example for the application of the doctrine of res ipsa loquitur.

As the author of the dissenting opinion states it:

> " * * * * Doctors sometimes are no more able to explain the mysteries of life or death than laymen. But where a doctor is in absolute control of a situation which results in unusual and serious injury to his patient, at the very least he should have the obligation of showing that he was free from fault -- that his treatment accorded with the standard of care maintained by his professional colleagues in his community. Proferring such proof would doubtless come easier to him than proof to the contrary to his patient."

This Court has recognized the opinions of the Municipal Court of Appeals (now known as the District of Columbia Court of Appeals) as being of persuasive effect.

In — **Schwartzbach v. Thompson**, 33 A. 2d 624 (1943), and again in **Bonbrest v. Lewis**, 54 A. 2d 751 (1947), that Court affirmed a judgment for the plaintiff in cases where an automobile had been legally parked, and was struck by another motor vehicle, the plaintiff simply proving the ownership of the striking vehicle and relying upon the presumption of agency created under the Financial Responsibility Act of the District of Columbia, under Title 40-403, D.C. Code.

In — **Haw v. Liberty Mutual Insurance Company**, 86 U.S. App. D.C. 86, 91, 180 F. 2d 18, this Court, in a unanimous opinion written by Judge Washington, recognized the above two cases, in this language:

> "* * * That plaintiff's evidence made out a case for the jury seems clear. It has been held consistently that when a moving vehicle strikes a stationary object which is not out of its proper place, a prima facie case of negligence is established. (citing Schwartzbach and Bonbrest, supra). While such cases generally have involved the unintentional striking of a parked vehicle, the rule there established seems applicable here * * * *"

In — **Ambrosi v. Monks**, 85 A. 2d 188 (1951), a dental malpractice case very similar on facts to the instant case, the trial court had directed a verdict for the defendant-dentist at the close of the plaintiff's evidence. In reversing such action, the Municipal Court of Appeals stated:

> "We think it can be said as a matter of common knowledge that the extraction of a tooth, done in a reasonably careful manner, will not ordinarily result in the fracture of an adjacent tooth. And we think this unusual or out of the ordinary result called for an explanation by Dr. Monks and that in the absence of such explanation it was error to direct a verdict in his favor."

If the fracture of an "adjacent tooth" thus calls for an explanation by the defendant-dentist, a fortiori, certainly the fracturing of a jaw should similarly call for such an explanation.

With the increased jurisdiction of the District of Columbia Court of General Sessions (now up to $10,000.00), many of the tort cases formerly filed in the United States District Court are now being filed in said court. And if the current decision in the instant case is allowed to stand, it is apparent that there will be a conflict in the decisions of this Court with that of the Municipal Court of Appeals (now D.C. Court of Appeals).

As a matter of fact, the split-decision of this Court in the instant case is in conflict with other decisions of this very court. In — **Byrom v. Eastern Dispensary & Casualty Hospital**, 78 U.S. App. D.C. 42, 136 F. 2d

278 (1943), this Court, in reversing a jury verdict for the defendant in a medical malpractice case, wherein the defendant offered the testimony of no less than three qualified experts, said:

> "Unquestionably only experts are qualified to express an intelligent opinion as to what constitutes the proper method of treatment of a serious bone injury. But that their evidence should be accepted in exclusion of other evidence of conditions and results is contrary to the applicable rule, both in this jurisidction and elsewhere. As was said in Cornwell v. Sleicher, 119 Wash. 573, 205 P. 1059, 1061, the proposition that experts alone are qualified to testify as to the manner of treatment of a patient is 'sound only when soundly applied', and 'that there must be, in the nature of things, many instances where the facts alone prove the negligence, and where it is unnecessary to have the opinions of persons skilled in the particular science to show unskillful and negligent treatment.' "

It is in just such cases as the instant case that a plaintiff may rest his case on the mere fact of his injury.

This Court recognized such fact in — **Rodgers v. Lawson**, 83 U.S. App. D.C. 281 284, 170 F. 2d 157 (1948), when Judge Stephens, writing for the Court, stated, on page 284, citing — **Whetstine v. Moravec** (1940), 228 Iowa 352, 291 N.W. 425:

> " * * * * the evidence tended to show that in the course of an extraction under anesthesia the root of a patient's tooth had been permitted to pass into his lung, with resultant serious injury. It was held that the operation and instrumentalities having been under the sole control of the defendant extractionist the doctrine of res ipsa loquitur applied, so that in the absence of evidence to the contrary produced by the defendant the jury was entitled to conclude that the event was a consequence of his neglect. It was held that expert testimony to establish neglect was not necessary. * * * *"

This Court held, in — **Winstead v. Hildenbrand**, 81 U.S. App. D.C. 368, 159 F. 2d 25, (1947), that whether the proximate case of a plaintiff's blindness was the continued use by the defendant of tryparsamide injections

in treating plaintiff for cerebro-spinal syphilis, or whether the syphilis itself caused the blindness, was a question for the jury.

In — **Young v. Fishback**, 104 U.S. App. D.C. 372, 262 F. 2d 469 (1958), this Court, in reversing the trial court for having directed a verdict for the defendant physician, because the plaintiff had not produced expert testimony, stated:

> "We think the court erred in taking the case from the jury. Everybody knows, without being told by an expert, that it is not approved surgical practice to leave in a patient's body a small bit of gauze or a few threads therefrom, or any other foreign non-absorbable substance, no matter how small. It was for the jury to say whether the defendant had left even a small piece of gauze or other foreign substance in the wound and had thus caused the abscess."

And in — **Rotan v. Greenbaum**, 107 U.S. App. D.C. 16, 273 F. 2d 830, (1959), in reversing the same trial judge involved in the instant case, this Court held that in an action against a physician for the death of a patient who expired 15 or 20 minutes after he had administered to her 600,000 units of penicillin, wherein the physician testified that penicillin is not a therapeutic for mumps, his record was adduced showing his entry that the injection was for "mumps & pharangitis" (sic) though the words "& pharangitis" were apparently inserted with a different pen, and the defendant admitted that those words might have been entered subsequent to the original entry, the questions of whether the defendant had given penicillin injection for mumps alone, whether such treatment did not meet requirements of standard practice in the district, and whether the defendant was guilty of negligence proximately causing death, were questions for the jury.

It is respectfully submitted that the foregoing decisions cannot be reconciled with the instant decision, and that the subject is one deserving the consideration of the full court. In asking defense apologists, spokesmen for malpractice carriers, and the medical profession to understand

that it makes sense in cases of obvious and abnormal medical or dental negligence to apply the doctrine of res ipsa loquitur, we are not asking for an exhibition of supererogatory compassion on their part, or that they should gild the Golden Rule if they could, but merely for a non-formidable exercise of fairness and good sense. Stripped of its Latin mask, the doctrine simply means that in terms of ordinary experience and common knowledge certain mishaps, accidents, catastrophies are so abnormal and exceptional that their very occurrence gives rise to a reasoned inference from circumstantial evidence that somebody has been negligent. Examples abound. In our own jurisdiction, see — **Washington Loan & Trust Co. v. Hickey**, 78 U.S. App. D.C. 59, 137 F. 2d 677; **Kerlin v. Washington Gas Light Co.**, 110 F. Supp. 487, aff'd in 94 U.S. App. D.C. 39, 211 F. 2d 649.

As unassailably stated in — **Rouse v. Hornsby**, 67 Fed. 219, 221 (8 Cir., 1895) —

> "The time will never come when a collision resulting from an attempt to have two trains going at full speed, in opposite directions, pass each other, on the same track, will not be held to be negligence in law."

In accord, see — **Pillars v. R. J. Reynolds Tobacco Co.**, 117 Miss. 490, 78 So. 365 (1918) (human toe in chewing tobacco).

It is an open secret that the notorious refusal of physicians and surgeons to testify against one another in malpractice actions has sparked and given impetus to the application of **res ipsa** in professional negligence cases. For instance, a survey made by the Boston University Law-Medicine Research Institute, and reported in **Medical Economics**, August 28, 1961, found that out of 214 doctors, only 31% of the specialists and 27% of the general practitioners said that they would be willing to appear for the plaintiff where a surgeon, operating on a diseased kidney, **REMOVED THE WRONG ONE.** What is the essential difference between this "understandable reticence" (as defense apologists term it) and the "conspiracy of silence ?" The word "banana" makes more forthright sense than "elongated yellow fruit."

In the States, courts are invariably applying the doctrine of res ipsa loquitur in medical and hospital cases, where the result ~~of~~ is unusual. A few of the latest cases are: **Davis v. Memorial Hospital,** 376 P. 2d 561 (Supreme Court of California, en banc, December 6, 1962). **Fehrman v. Smirl,** 121 N. W. 2d 255 (Wisconsin, April 30, 1963); **Horner v. Northern Pacific Ben. Ass'n. Hosps.,** 383 P. 2d 518 (Supreme Court of Washington, June 13, 1963).

There is no doubt about it. Res Ipsa Loquitur, as handled by the courts of other jurisdictions, has had seismic emotional effect on the medical profession. But their misconceived alarm recalls the story about the Monroe Doctrine. A lynch mob had menacingly gathered to hang a wretch huddled in the dust of a southern road, and were threatening to string him up. The local sheriff rushed up to the disorderly crowd and demanded to know what was the matter. "He hates the Monroe Doctrine," shouted the mob. The wretched man in the dust looked up and desperately explained, "I don't hate the Monroe Doctrine. I love the Monroe Doctrine. I'd die for the Monroe Doctrine. I just said I didn't know what the Monroe Doctrine was."

It is suggested that many spokesmen for the medical profession are waging a fierce war against the doctrine of Res Ipsa Loquitur without really understanding what it is.

Wherefore, it is respectfully urged that this Court grant a rehearing of this cause in banc, so that it can be definitely decided, once and for all times, that the doctrine of res ipsa loquitur is or is not applicable to medical, dental, and hospital malpractice cases.

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EARL H. DAVIS

504 Federal Bar Building
Washington 6, D. C.

*Attorney for Appellant.*

## CERTIFICATE OF COUNSEL

I, Earl H. Davis, attorney for the appellant herein, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Earl H. Davis

December 26, 1963

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Petition for a Rehearing in Banc was mailed, postage prepaid, this 26th day of December 1963 to H. Mason Welch, Esquire, Attorney for Appellee, Investment Building, Washington 5, D. C.

Earl H. Davis

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 17,490

GRACE FISHER BROWN,

*Appellant,*

v.

JOHN F. KEAVENY,

*Appellee.*

## OPPOSITION TO APPELLANT'S PETITION FOR A REHEARING IN BANC

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Comes now the appellee, by and through his attorneys, and opposes the Petition of the appellant For a Rehearing In Banc and as reasons, the appellee states as follows:

This was a malpractice case in which the appellant attempted to rely upon both specific negligence and res ipsa loquitur among other theories of liability. At the close of the plaintiff's case, the trial court directed a verdict for the appellee on the issues of negligence and res ipsa loquitur. The appellant's Petition herein for Rehearing in Banc

alleges that the court should have allowed the jury to consider the matter on the theory of res ipsa loquitur.

In order to put the matter in proper perspective, a short review of the facts pertaining to this theory are herein set out.

For ten years prior to the extraction by the appellee, the appellant was under the care of Dr. J. Edward Hurley for dental work, a dentist of twenty-three and one-half years experience. Dr. Hurley took full mouth X-rays of the appellant at intervals of approximately every one to one and one-half years over the ten year period. Over the years, Dr. Hurley had made it clear to the appellant that the impacted molar she had, would be most difficult to remove and would require the services of a specialist as it was so difficult Dr. Hurley would not undertake this extraction, although he had done other extractions on the appellant, and that it should be left alone unless pathology or disease should develop because there was a possibility of a fracture. In 1958 x-rays of the impacted molar taken by Dr. Hurley revealed that a diseased condition in the impacted molar existed and so the molar would have to be extracted to avoid osteomyelitis. Dr. Hurley thereupon referred the appellant to the appellee for the extraction. In the course of the extraction by the appellee, the appellant's jaw was broken. The appellant called the appellee as a witness and obtained from him his professional opinion that the jaw was broken as a result of muscle spasm, although the appellee could not state with certainty the cause of the fracture.

The appellant alleges in her Petition for Rehearing that "defense apologists" do not understand res ipsa loquitur. Res ipsa loquitur is a convenient explanation for a theory of law wherein the burden of proceeding shifts from a plaintiff to a defendant after the plaintiff has proven that the agency which caused his injury was under the exclusive control of the defendant, and the possibility of contributory negligence has been eliminated, and the accident which occurred is of a kind which ordinarily does not occur in the absence of someone's negligence. Having

proven this much, a plaintiff is entitled to a presumption of negligence unless the accident is satisfactorily explained by the defendant. If the defendant satisfactorily explains the occurrence, the presumption fails and there is no case for a jury to consider.

At the outset, it might be well to examine the historical context in which res ipsa loquitur developed. In our adversary type of proceeding, the plaintiff ordinarily has the burden of proving the specific negligence of the defendant. Prior to the enactment of the discovery procedures involved in the Federal Rules of Civil Procedure, this often created a difficult situation for the plaintiff in situations meeting the requirements of res ipsa loquitur, and so the burden of proceeding was transferred to the defendant. Since the enactment of the Federal Rules of Civil Procedure, the very reason for the theory of res ipsa loquitur has been eliminated as a plaintiff may use the discovery procedures prior to trial, or Rule 43, during trial in order to incorporate in his own case the evidence setting forth what occurred with the agency causing his injury while it was under the exclusive control of the defendant. A perfect example of a plaintiff's difficulty under the old rules of procedure is found in the classic case of Byrne v. Boadle (1863) 2 H. & C. 722. This was the famous barrel falling out of the warehouse window upon which most of us cut our teeth in the theory of res ipsa loquitur while law students. Therein the plaintiff was presented with the impossible task of proving what caused the barrel to come out of the window and because of this difficulty, the court adopted the theory of res ipsa loquitur to require the defendant to explain it. Under our modern procedure, the plaintiff would have known exactly what had happened to the barrel prior to trial by the use of depositions or interrogatories.

The appellant requests that this Court sit in banc in order that "it can be definitely decided, once and for all times, that the doctrine of res ipsa loquitur is or is not applicable to medical, dental, and hospital cases." It escapes the appellee's understanding as to why we are limiting this to medical cases when the Rules we are discussing apply

to professional liability and not solely our brother professionals in the medical profession. However, it should be noted that this very question was before this Court in an in banc hearing as recently as 1961. Quick v. Thurston (1961) 110 App. D.C. 169, 290 F.2d 360. In that case, this Court adhered to its previous ruling in Johnston v. Rodis (1958) 102 App. D.C. 209, 251 F.2d 917. It would seem, therefore, that this matter had been decided, and quite recently, but apparently not laid to rest.

In the rather impassioned Petition, we are told that it is an open secret that there is a notorious refusal of physicians to testify against one another. Again we should like to point out that it is fundamental that there would be a reticency on the part of any professional to testify against a brother practitioner, and judging from the paucity of damage suits against attorneys, it would appear that attorneys are not only hesitant to testify against one another but also hestitant to accept such cases. Judging by the number of malpractice cases filed against our brother profession, the medical fraternity, we of the legal profession do not seem to have some hesitancy in accepting cases of professional malpractice against physicians. The appellant points out a study made by the Boston University Law - Medicine Research Institute wherein the doctors were asked whether they would willingly appear in a case wherein the facts were formulated to state a situation of obvious malpractice. Of course, the key word in the statement is willingly. Unless the appellant contends the medical profession has also conspired to commit perjury, the problem is easily solved by a subpoena.

The appellant contends that courts are invariably applying the doctrine of res ipsa loquitur in professional malpractice cases where the result is unusual. Fortunately, the courts are allowing res ipsa loquitur in professional malpractice cases only where the malpractice is of a kind that is susceptible to judgment by lay persons. The result is not the pivotal question, for if it were, everytime a plaintiff was defeated in a rear-end collision case, the plaintiff's attorney should be

subjected to a malpractice case based on the theory of res ipsa loquitur. Such unexpected results in our own professional sphere can be multiplied and we would, ourselves, be horrified to have suits putting our professional competency in question based solely on an unusual result.

It should also be pointed out that the malpractice which many times appears obvious to the layman is really not so obvious, and that the courts are, and should be, wary of allowing a presumption of negligence based upon a layman's limited knowledge of the intricacies of a learned profession. In one of the dissenting opinions in Quick v. Thurston, supra at page 176, it was stated:

> "When sterile procedures were unknown, infections often resulted from operations performed in accordance with standards then accepted. But probably no one would contend, unless in making a legal argument, that infections often result from operations performed in accordance with standards now accepted. Rejection of res ipsa in the present cirstances seems to me an anachronism."

This statement constitutes a statement of the view probably of most laymen. However, in a non-legal argument appearing in The Surgical Clinic of North America, Volume 43, No. 3 for June, 1963, there is a rather extensive discussion of the problem of hospital infections together with statistical studies. In that study, it was pointed out that at the Massachusetts Memorial Hospital in the period 1950 to 1961, there was an average of 4.26% of postoperative infections. It is also pointed out in this study that at the Massachusetts General Hospital in the period 1941 through 1953, the incidents of post-operative infection following sub-total gastrectomies in the period 1941 through 1953 decreased from 16 to 4%, but that beginning in 1954, the rate had climbed again to a 9.4% of post-operative infections. It is pointed out in the study that the increase of infection is due to a number of different medical reasons, none of which would support a presumption of a negligent cause. Another study appearing in the Public Health and Laboratory Services of

England and Wales, which is published in Lancet in 1960, placed the infection complication rate at 9.7%. It is understandable, therefore, that the medical profession is often shocked at statements made in the course of litigation, which attempt to determine that very complicated medical problems about which the physicians themselves have great difficulty are so simple that a layman may judge the presence or absence of negligence on the part of a particular physician.

In the instant case, it should be pointed out that there is no basis for a layman saying that in this situation the injury would not have resulted but for somebody's negligence. The evidence was that this tooth was an extremely badly impacted tooth, that although the appellant's usual dentist had performed extractions from the appellant's mouth, he would not attempt this extraction because of the danger inherent in it and, therefore, referred her to the appellee. We have, therefore, a situation fraught with danger, not one in which negligence is presumed because injury would not ordinarily result except for somebody's negligence.

The appellant, in the course of this litigation, has argued strenuously that the jury should have been allowed to presume that the fracture resulted from the use of too much pressure in the use of the surgical mallet and chisel, and that if they accepted this presumption, negligence was established. The determination of how much pressure is required in the use of a surgical mallet and chisel is clearly a decision made by the use of professional judgment and it would indeed be a radical and serious blow to all professionals if they were presumed to be negligent when their professional judgment proved erroneous. Again, it is helpful to put this matter in a context of the legal profession.

Everytime an offer of settlement is made and refused and a matter litigated, the professional judgment of one of the attorneys is proved erroneous.

Respectfully submitted,

WELCH, DAILY & WELCH

By: _____
H. Mason Welch

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J. Harry Welch

_____
J. Joseph Barse

_____
Walter J. Murphy, Jr.

_____
James A. Welch

1511 K Street, N. W.
Washington, D. C. 20005

*Attorneys for Appellee*